PETITION NOT PRINTED

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# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1958~~ 1959

No. ~~285~~ 52

ELIJAH McNEAL, JR., PETITIONER,

vs.

R. O. CULVER, AS STATE PRISON CUSTODIAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1959

CERTIORARI GRANTED MARCH 7, 1960

| | Original | Print |
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[fol. 1] [File endorsement omitted]

**IN THE SUPREME COURT OF FLORIDA AT TALLAHASSEE, FLORIDA**

ELIJAH MCNEAL, JR., Petitioner,

vs.

R. O. CULVER as STATE PRISON CUSTODIAN, Respondent

To the Supreme Court:

PETITION FOR WRIT OF HABEAS CORPUS—Filed March 21, 1959

Comes now the petitioner Elijah McNeal Jr. alias Lige McNeal Jr. in his own proper person without counsel, and respectfully represents unto the Court as follows:

That he is and has been restrained and detained of his liberty without authority of law and he presents this petition under and by virtue of Section (7) Declaration of Rights, Constitution of the State of Florida.

That petitioner is imprisoned and detained upon a judgment of conviction found against him without regard to his Federal Rights under the 14th Amendment to the Constitution of the United States, and in violation to the Constitution of Florida and in violation of the decisional rules and established law of Florida.

(1) The trial Court deprived him in his rights to representation by counsel as required by decisional rules and established law of Florida.

(2) The trial Court deprived him of a fair and impartial trial.

(3) The trial Court deprived him of "Due Process of Law".

(4) The trial Court deprived him of his Constitutional Rights under both State and Federal Constitutions.

(5) The trial Court deprived him of Due Notice by refusing to furnish him a copy of the Information.

[fol. 2] History of Case

Petitioner, shows he was informed against by the Hon. Clifton M. Kelly, County Solicitor of Polk County, Florida, and was tried on an Information charging Assault to Murder in the First Degree before the Honorable Roy H. Amidon, in the Criminal Court of Record, in and for Polk County, Florida, on February 26, 1958, the trial resulted in a conviction by a Jury of six, of the offence of Assault to Murder in the Second Degree.

Thereafter, on March 31, 1958, Judge Amidon imposed a sentence of twenty years, at hard labor in the Florida State Prison. The petitioner is a Negro age 30 and never before appeared in any court on a felony, and did not understand court procedure or know how to defend himself and establish his innocence. At the commencement of trial Judge Roy H. Amidon, asked the petitioner if he had an attorney, petitioner answered no. And requested the court to appoint some one to represent him. The Court answered if the charge was a capital offence, I would appoint you an attorney, but since this is not a capital offence you are not entitled to a court appointed attorney and you won't need a Lawyer in this case, and then informed your petitioner he would be allowed to question the witnesses and also informed me I could take the witness stand in my behalf, but I would be questioned and crossed examined by the County Solicitor. Petitioner asked the Court if he could have a copy of the Information and a list of the State witnesses, the Court said that would not be necessary as the Information would be read to him, and that I would see all the witnesses when they took the stand. Thereupon, the State picked a Jury of six, and the County Solicitor, read the Information and the trial [fol. 3] began. The Complaining witness was a Negro named Scurry, who testified your petitioner shot at point blank from a distance of fifteen feet with a shot gun but testified he Scurry, wasn't hit.

End of History

Questions Involved in This Petition

(1) The trial Court violated the petitioner's Constitutional rights both State and Federal, in denying the petitioner the organic Constitutional right to be furnished a copy of the Information entered against him.

(2) The trial Court violated the petitioner's Constitutional rights both State and Federal, by denying him the right to representation by court appointed counsel as required by decisional rules and established law, as laid down by the Florida Supreme Court, and as held by the United State Supreme Court.

Argument on Point (1)

Under Florida law, and Section II Declaration of Rights, Constitution of the State of Florida, and under the Constitution of the United States, is a man entitled to Due Notice by furnishing him a copy of the Information or Indictment when charged with a crime?

The Federal and State decisions are abundant with instances wherein it is consistently held that one, in the circumstances of your petitioner's situation was entitled as a matter of right to Notice of the charge against him, by furnishing him a copy of the Information.

The Due Process clause of the 14th Amendment to the United States Constitution required it, The Florida Bill of Rights, required it and Florida Statue 906.28 *Required it.*

Petitioner, relies on decisions of the United States Supreme Court, and decisions of the Supreme Court of Florida, [fol. 4] which specifically apply and control the instant situation.

The Florida Supreme Court in the case "House v. State, 130 Fla. 400; 177 So. 705; made the observation that:

"When construing the Constitution of the United States it is the duty of this Court to follow the Con-

stitution placed thereon by the Supreme Court of the United States".

Failure of the trial Judge to invoke the State Statute and Bill of Rights, (Florida Constitution) in these circumstances was a failure to invoke Due Process because, Florida Constitution and the statute in question, are such that they commit the Florida Courts to the doctrine laid down by the United States Supreme Court when interpreting similar rights under and by virtue of the Due Process Clause of the 14th, Amendment.

It is not difficult to define Federal due process, because the elements of which it is composed are clearly and definitely enumerated in the Bill of Rights. When on the other hand, one undertakes to define State due process, he finds himself faced with almost insuperable difficulties. Instead of dealing with a single unit of government possessing a written constitution in which the essential elements of due process are clearly stated, he must deal with forty-eight governments, each with its own constitution, set of statutes, and doctrines, of judicial interpretations. One might almost despair of finding any common element in the various definitions of due process, had not the presence of due process clause in the 14th Amendment brought a number of cases involving its interpretations before the United States Supreme Court. From these decisions, and from the various treaties on the subject, it is possible to discover certain elements which are essential to due process in any one of the forty-eight States, these are:

[fol. 5] (1) Due Notice.
(2) A Hearing.
(3) Hearing before a competent tribunal.
(4) A trial free from irregularities of procedure.
(5) Freedom from arbitrary legislative action.

The first three items rest upon the decision in "Twining v. New Jersey, 211 U.S. 78, which in turn rests in part on the decision in the earlier case of Den ex dem. Murray v. Hoboken Land and Improvement Company, 18 Howard 272. The remaining items are based on the writings of students of Constitutional Law. See Mott, Rodney L., Due Process of Law (Babbs-Merrill, Indianapolis 1926.) See also

"Burdick, Charles K., Law of the American Constitution (Putmames New York 1922), and Young, James T., The New American Government and its Work, Third Edition, Chapter 32 (Macmillan, New York, 1933), And on the subject of notice and hearing, see Mott. op. cit. chapter 13.

A reading of the above cited authorities and authorities that will be cited later in this brief, it will be seen the United States Supreme Court has held the right to due notice, or the right to be furnished a copy of the Information, when charged with crime, is an indispensable part of Due Process of Law, itself as required by Federal Law under the 14th, Amendment. and required under the Florida Constitution. See House v. Mayo, 63 Fed. Supp. 169.

The Supreme Court of Florida has consistently held that the trial Courts of Florida, must conduct the trial of defendants in such a way as not to deprive them of Due Process. It is also a burden on all trial judges to protect [fol. 6] the Constitutional Rights of defendant's that appear before them.

In support of the above petitioner cites a long line of cases. See:

"Wood v. State of Florida, 19 So. 2nd 872-876;
"Christie v. State, 94 Fla. 469, 114 So. 450;
"House v. Mayo, 324 U.S. 42, 65 Sup. Ct. 517;
"Hawk v. Olson, 326 U.S. 271, 66 Sup. Ct. 116;
"Messer v. State, 120 Fla. 95, 162 So. 146;
"House v. State, 130 Fla. 400, 177 So. 705;
"Deeb v. State, 131 Fla. 362, 179 So. 894;
"Scott v. State, 101 Fla. 250, 134 So. 50;
"Ziegler v. State, 95 Fla. 108, 116 So. 241;

The question in this petition is basic and fundamental under American Law. Neither the facts nor the record are in dispute. Due Process, Fairness and Right, and the American way, demand that the petitioner be given due notice, State Statutes, such as the one here involved, were designed and enacted not only to clarify due process, but to control the local habits of procedure, so as to bend them into line with the rules laid down by the appellate Courts. Such State laws are but more civilized refinements of the constitutional law. They have but one end in view, i.e. to protect accused persons in situations identical to the petitioner's trial Court predicament. Failure of the trial

Judge to apply the State Statute was a failure to invoke the constitutional safeguard and the judgment and imprisonment predicated on such a failure is void.

It has become well settled throughout all jurisdictions of this country; in all our State Courts of last resort; and in the United States Supreme Court, that convictions for alleged criminal offenses, when they have been arrived at via detours from the legitimate highway of constitutional construction; when there foundation is laid in judicial pro-[fol. 7] cedures which lacked the essential rudiments of American Justice-Fairness and Right-, they are without the validity necessary to lawful enforcement; they are convictions found in violation of Due Process of Law, and as such are contrary to and in violation of the 14th, Amendment to the United States Constitution. Such convictions have been universally held to be not merely voidable, but are void from the-r inception.

Some further consideration of this right is found in the case of Lee v. State 155 So. 123:

> "When the State places a person accused of crime upon trial where life or liberty is involved, it can never consistent with its dignity, as the sovereign power, its sense of justice to its citizens, and its obligations to preserve its tribunals absolutely free from all suspicion of smartness and trickery and unfair advantage, deny to the accused every legal right he has to a fair and impartial trial. He has a constitutional right to a trial by due course of law, and to the administration of right and justice without sale, denial or delay. He may demand the nature and cause of the accusation against him, to meet the witnesses face to face, and be furnished a copy of the indictment."

Can this Honorable Court say section II of the Declaration of Rights of the Florida Constitution, and the Fourteenth Amendment of the Constitution of the United States was complied with.

To permit a man's freedom to be forfeited upon such illegal procedure of trial without notice would make of the constitutional requirement of Due Process of Law, a meaningless symbol.

When the light of the Constitution is thrown upon the facts in the case, and where it is clear that action of the

trial Judge violates terms of the State and Federal Constitutions, it is the obligation of this Honorable Court so to declare.

The actions of State Courts and of judicial officers in their official capacities is to be regarded as action of the State within the Fourteenth Amendment. State action in viola- [fol. 8] tion of the Fourteenth Amendment, is equally repugnant to the Constitutional commands whether directed by State statute or taken by a judicial official in absence of statute. The action of State courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend is a denial of Due Process of Law, guaranteed by the Fourteenth Amendment. State action within the Fourteenth Amendment refers to exertions of State power in all forms and when the effect of that action is to deny rights subject to protection of the Fourteenth Amendment, it is the obligation of this Honorable Court to enforce the Constitutional commands of the Fourteenth Amendment.

Due Process of Law, preserved for all by our constitution, commands that no such practice as that disclosed by this petition shall send any accused to prison. No higher duty, no more solemn responsibility rests upon this Honorable Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution.

In view of the requirement of section II of the Declaration of Rights of the Florida Constitution, which says a defendant can demand the nature and cause of the accusation against him . . ." *And shall be Furnished with a Copy of The Indictment against him."*

And on the authority of the United States Supreme Court in "Twining v. New Jersey, 211 U.S. 78. where the Court held the right to Due Notice or, *to be furnished a copy of the Information was an indispensable part of Due Process of Law.*

[fol. 9] Argument on Question (2)

It has been shown the petitioner was a Negro man and never before appeared in court on a felony and therefore, did not know how to defend himself. Both State and Fed-

eral Constitutions, says it would be a violation of Due Process of Law to put to trial a man on a criminal offense without counsel when it is shown he is incapable of representing himself adequately.

The complaining witness in this case testified the petitioner shot at him point blank from a distant of 15 feet with a shot gun. But yet he that witness was not hit. This court knows there is something wrong with that testimony, as it would be impossible to fire a shot gun at any one from 15 feet away and not hit him. If petitioner had been represented by counsel, there is a good chance he would have been able to establish through proper cross-examination that there was no assault made upon the witness only a discharge of a gun in a public place.

The high courts have consistantly held that a trial such as the one had by your petitioner is as no trial. This case, therefore, involves another of the many applications of the settled doctrine, summarized in the opening words of "Palmer v. Ashe, 342 U.S. 134, 135;

> "This court has repeatedly held that the Due Process clause of the Fourteenth Amendment requires States to afford defendants assistance of counsel in noncapital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and a fair trial."

One of the catalogues of such circumstances is that in [fol. 10] Uveges v. Pennsylvania, 335 U.S. 437, 441 where the United States Supreme Court said the counsel was required.

> "Where the gravity of the crime and other factors such as age and education of the defendant the conduct of the court or the prosecuting officials and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair."

Petitioner stood trial. What happened illustrates the observation in "Gibbs v. Burke, 337 U.S. 773;

> "A defendant who pleads not guilty and elects to go to trial is usua-ly more in need of the assistance of a lawyer than one who pleads guilty." 337 U.S. at 381.

The most recent case dealing with the same questions raised in this petition is a Florida case. "Cash v. R. O. Culver, this Court denied Cash a Writ of Habeas Corpus, on the same grounds. Cash filed a Writ of Certiorari, before the United States Supreme Court, the Court granted Certiorari, and directed this Court to reconsider Cash's Writ, that case is before this Court now.

Petitioner, rests the case equally upon the complexity of the trial judgments petitioner had to make, "Rice v. Olson, 324 U.S. 786, Williams v. Kaiser, 323 U.S. 471; Vonmelke v Gillies, 332 U.S. 708, and on the failure of the trial judge to "guide a defendant without a lawyer past errors that make trials unfair," "Townsend v. Burke 334 U.S. 736;

The Florida Supreme Court has consistantly held the trial courts of Florida *must* appoint counsel for indigent defendants, when requested and it is shown the defendant is not capable of representing himself, and has consistantly held the trial court *must* inquire if the accused is repre- [fol. 11] sented by counsel if not it has been the practice to appoint some attorney to represent the accused. See:

"Zellers v. State, 189 So 236, 138 Fla. 458;

This Honorable Court said in Sneed v. Mayo, 66 So. 2d, 865;

> "From the above cited cases, and the State Federal decisions and Statues cited therein, certain principles seem clearly established. The court has no right to deprive the accused of the benefit of counsel in a criminal proceedings."

It has been shown the petitioner did not know court procedure, as he had never been in court before, therefore, it was a burden on the trail judge to inform him of his

Constitutional rights, and appoint counsel as is the practice in Florida, See "Sneed v. Mayo, supra. this court said.

> "It has been the general practice in trial courts of this state, when a person charged with a felony and brought to the bar for arraingnment, to inquire of the accused whether he had counsel to represent him, and if, upon inquiry, it developed that he had not an attorney and was unable to employ one, to ask the accused if he desired to be represented by counsel, that it has been the practice for trial judges to appoint some attorney to represent the accused. This practice is in accord with the letter and spirit of the Bill of Rights, and section 3969 of the General Statu-es of 1906—now section 909.21 Florida Statu-es 1951. FSA. . . . While the practice in this State has been as indicated above, still there is no law requiring it unless the accused is incapable of representing himself adequately at the trial on account of age, ignorance or lack of mental capacity."

Can a layman that has never been in court before adequately represent himself in a criminal trail?

The United States Supreme Court answered this question in Powell v. Alabama 287 U.S. 45; 53 S.C. 55-65; 77 L. Ed. 158; 84 A. LLR. 527; The Court said:

> "What, then, does a hearing include? Historically and in practice in our country at least, *it has always* [fol.12] *included the right to the aid of counsel when desired and provided by the party asserting the right.* The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of eviden-e without a proper charge, and *convicted upon incompetent* evidence, or irrelevant to the issues or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of

counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case civil or criminal, a state or federal court were arbitrar-ly to refuse to hear a party by counsel, employed by and appearing for him it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sence."

Further on the same opinion, the United States Supreme Court continues:

"In exparte Riggins (C.C.) 134 Fed. 404, 418, a case involving the Due Process clause of the Fourteenth Amendment, the Court said, by way of illustration, that if the state should deprive a person of the benifit of counsel, it would not be due process of law. Judge Cooley refers to the right of a person accused of crime to have counsel as perhaps his most important privilege, and after discussing the developement of the English Law on that subject, says: "With us it is a universal principle of shall be allowed a defense by counsel." (I Cooley, Const. Lim. 8th, Ed. 7 C.) The same author, as appears from a chapter which he added to his edition of story on the Constitution, regarding the right of the accused to the presence, advice and assistance of counsel as fundamantal in character. E. G. People v. Napthaly, 105 Cal. 641, 644, 39 Pac. 23; Cutts vs. State, of Florida 54 Fla. 21 23, 45 Sc. 491; Martin v. State, 51 Ga. 567, 568, I Am. Crim. Rep. 536; Sheppard v. State, 165 Ga. 460 464, 141 S.E. 196; State v. Moore, 61 Kan. 732, 734, 60 Pac. 748; State v. Ferris, La. Ann. 424;"

[fol. 13] In Messer v. State, 120 Fla. 95, 162 So. 146, the Florida Supreme Court said:

"The constitutional right of an accused to be heard by counsel is stated in language of emphasis that means just what it says. *It should* be respected in substance as

well as in form by the trial courts. The United States Supreme Court in Powell v. State of Alabama (supra) has gone so far as to hold that the constitutional right to be heard by counsel is an indispensable part of due process of law, itself as required by federal law under the 14th amendment. The right to be heard by counsel being a constitutional one. It follows that no intentional nor unintentional frittering away of the constitutional privilege in this regard should be tolerated . . ."

Some further consideration of this right is found in the case of House v. State, 130 Fla. 400, 177 So. 705, wherein the Florida Supreme Court said:

"The Supreme Court of the United States has held that *the right of one charged with crime to be represented by counsel includes a fair opportunity to secure counsel of his own choice, and that he is as much entitled to the assistance of counsel in preparing his trial as at the trial itself and that a denial of these rights is contrary to the due process clause of the 14th amendment of the Federal Constitution.*"

In so far as the instant case of petitioner McNeal, is concerned, the practical and mandatory application of these rules is found to squarely fit the circumstances about which he complains, if only by virtue of the following federal rule and to this State (Florida) as found in the decision of House v. Mayo, 63 Fed. Supp. 169:

"In Florida it is held that the right of the accused in all criminal cases to be heard by himself, or counsel or both, as guaranteed by Section II of the Declaration of Rights of the Florida Constitution, is more than a mere right of the accused. It is a mandatory organic rule of procedure in all criminal prosecutions, and [fol. 14] a requisite of a fair and impartial trial in that state. Deed v. State, 131 Fla. 362, 179 So. 849; Christie v. State 94 Fla. 469, 114 So. 450. This being the nature of the right conferred by the Florida Constitution, denial of due process guaranteed by the 14th Amendment which may be redressed, in appropriate circumstances in a federal court by habeas corpus. Ex-parte Hawk v. Kaiser, 323 U.S. 471, 65 Sup. Ct. 363, 89

L. Ed. 321 U.S. II 64 Sup. Ct. 448, 88 L. Ed. 572; Of Tomkins v. Missouri, 323 U.S. 485, 65 Sup. Ct. 370; House v. State, 130 Fla. 400, 177 So. 705."

Under these circumstances can this Honorable Court hold that this petitioner was capable of defending himself? In Powell v. Alabama supra, the United States Supreme Court, must have in mind such a case as the petitioner's. As that opinion covers the facts in this case. And it will be found in Betts v. Brady, the Supreme Court of the United States quoted in that opinion:

"Would it not be a little like mockery to secure to a pauper these solemn constitutional guarantees for a fair and full trial of the matters with which he was charged, and yet say to him when on trial that he must employ his own counsel, who could alone render these guarantees of any real permanent value to him? Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?"

"Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the Universal sense of justice. Throughout this country, for example, the Supreme Court of Indiana said: "'It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty should be debarred of counsel because he was too poor to employ such aid. "No court could be respected, or respect itself to sit and hear such a trial. The defense of the poor in such cases, is a duty resting somewhere which will be a once conceded as essential to the accused to the court, and to the public. "'Webb v. Baird, 6 Ind. 13, 18. and most of the states have shown their agreement by constitutional provisions, statutes or established practice judicially approved which assure that no man shall be deprived of counsel—merely be- [fol. 15] cause of his poverty. Any other practice seems to me to defeat the premise of our democratic society to provide equal justice under the law."

The above view taken by the United States Supreme Court, and also in Wade v. Mayo, says such a trial as the petitioner had is as no trial at all.

What is the meaning of the equal protection clause? It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, so that all persons similarly circumstanced shall be treated alike.

How do the courts consider the due process of law provision? A statu-e which undertakes to deprive a person of his liberty without notice and opportunity to be heard by counsel certainly is invalid. The courts have held that the due process of law provision is the most important guaranty of personal rights to be found in the Federal or State Constitutions. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitraiiy be deprived of his life, liberty or property. This the legislature cannot do nor authorize to be done. The United States Supreme Court, has repeatingly declared that due process guaranteed by the Federal Constitution requires a trial in a State Court, conforming to the fundamental concepts of justice which lie at the base of our civil and political insittitions, and that if the state supplies no corrective process the Federal Courts will intervene to protect the life or liberty of the citizen from a [fol. 16] judgment where the trial is not conducted according to such standard.

It will be seen by the authority cited in this petition, that it is the practice in Florida to appoint counsel to indigent defendants. Did the petitioner in this cause receive the same equal protection of the law as other defendants have received in the Florida Courts under the same circumstances?

Can it be said that the petitioner received a fair and impartial trial, as required under both Federal and State Constitutions, and the trial was conducted according to standards laid down by those constitutions.

The authoritys cited and the facts in this case warrants the serious consideration of this Honorable Court.

Wherefore, petitioner respectfully prays unto this Honorable Court, that the gracious State Writ of Habeas Corpus issue forthwith, according to law, directed the

*the* above named respondant, to the end, that relief appropriate to the circumstances be granted that pursuant thereto, petitioner be discharged from unlawful custody.

S. Elijah McNeal, Jr., Petitioner, Box 221, Raiford, Florida.

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[fol. 16a] AFFIDAVIT OF SERVICE (Omitted in Printing)

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[fol. 17] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

WRIT OF HABEAS CORPUS—April 17, 1959

In the Name and by The Authority of the State of Florida:

To

R. O. Culver, as Custodian of Florida State Prison, Greeting:

You are hereby commanded that you have the body of Elijah McNeal, Jr. by you illegally detained and imprisoned, as it is said, and that you forthwith before the Justices of the Supreme Court of Florida, produce the said Elijah McNeal, Jr. in the City of Tallahassee, instanter, and that you do and receive what then and there shall be considered and determined concerning the said Elijah McNeal, Jr. and otherwise comply with the orders of said Supreme Court and that you then and there have this Writ and make due and proper return thereto.

Witness the Honorable Glenn Terrell, Chief Justice of the Supreme Court of Florida, and the Seal of said Court, at Tallahassee, the Capital, on this the 7th day of April, 1959.

Clerk Supreme Court of Florida.

[fol. 18] [File endorsement omitted]

IN THE SUPREME COURT OF FLORIDA

[Title omitted]

MOTION TO REQUIRE RESPONDENT TO SERVE A COPY OF HIS RETURN ON PETITIONER and

MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF—Filed March 22, 1959.

To The Court:

Comes, now the petitioner Elijah McNeal Jr. and shows unto the Court that he filed a petition for writ of habeas corpus, this Honorable Court issued an order to show cause on April 7, 1959, and the Respondent filed his return on April 16, 1959, a copy of which was received by petitioner, on April 18, 1959.

The return served on petitioner, is not a true copy of the Return filed before this Court. On page 2, of respondent's return will be found this statement," . . . as will be more clearly reflected by a more perusal of said records, a true and correct copy of each being attached hereto and marked Exhibit "C" and "D" respectively," on page 4 of the respondent's return will be found this, The transcript of testimony attached hereto reflects throughout . . ."

The proof of service states a copy of the return was mailed to your petitioner, the petitioner was not served with Exhibit "D" of the return, and Exhibit "D" was *not* attached to the return, therefore petitioner cannot make his reply without a copy of the return.

[fol. 19] The rules of the Supreme Court of Florida, require the respondent to serve a copy of his brief or return on your petitioner, See Part (4) Rule (25) Section (3).

Wherefore, your petitioner prays unto this Court to issue an order directed to the Respondent to serve a copy of Exhibit "D" of his return on your petitioner, and grant an extension of time to file the reply brief, or issue an order ruling the return is insufficient, and grant the writ of habeas corpus as prayed for.

Petitioner shall ever so pray:

S. Elijah McNeal, Jr.

I hereby certify that I this day below have mailed to the Attorney General of Florida, the Honorable Richard W. Ervin a true copy of this Motion.

S. Elijah McNeal Jr., No. 62823. Box 221 O Y Raiford, Florida

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[fol. 20] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS

Comes now R. O. Culver, respondent in the above entitled cause and files this his response to the Writ of Habeas Corpus heretofore issued herein.

I

Respondent holds the petitioner in detention of his liberty under the authority of that certain commitment duly issued in this cause on April 1, 1958, by the Honorable Roy H. Amidon, Judge of the Criminal Court of Record in and for Polk County, Florida, whereby your respondent was duly ordered to keep and safely imprison the petitioner for a period of 20 years, all of which will be more clearly [fol. 21] reflected by a true and correct copy of said commitment attached hereto and marked Exhibit "A."

II

The aforesaid commitment was based upon a valid judgment and sentence entered against the petitioner for the offense of assault with intent to commit murder in the first degree, said judgment and sentence having been entered on the above named charge on March 31, 1958, as will be more clearly reflected by a true and correct copy of said judgment and sentence attached hereto and marked Exhibit "B."

## III

Respondent denies that the trial court refused to furnish petitioner a copy of the information entered against him, as alleged in petitioner's first complaint set forth on page 3 of petition herein, as no such alleged refusal appears either in the court minutes reflecting the arraignment of petitioner nor in the trial record of this cause as will be more clearly reflected by a mere perusal of said records, a true and correct copy of each being attached hereto and marked Exhibits "C" and "D" respectively.

Answering affirmatively respondent submits that the pertinent portion of Section 11, Declaration of Rights of the [fol. 22] Florida Constitution, to-wit: ". . . and shall be furnished with a copy of the indictment against him . . ." was enacted for the benefit of defendants in criminal cases, and such benefit may be waived by either the positive action of a defendant or by his failing to make timely request for a copy of such charging document.

In this regard we have failed to find any Florida decisions directly on point, see 89 So. 222, however, we call to the Court's attention the following pertinent excerpt from Article I, Section 6 of the Alabama Constitution of 1901:

> "That in all criminal prosecutions, the accused has a right to be heard by himself and counsel or either; to demand the nature and cause of the accusation; and to have a copy thereof;

The Supreme Court of Alabama in *Howard* v. *State*, 41 So. 301, 146 Ala. 149 ruled on this provision in the following language:

> "By Section 6 of the Bill of Rights in the Constitution of 1901 it is provided that the accused in a criminal prosecution shall have the right 'to demand the nature and cause of the accusation and to have a copy thereof.' This right, however, is one that may be waived by the accused. On the facts stated this court committed no error in its ruling. The defendant had been informed of the accusation against him on his arraignment, and pleaded not guilty. He then delayed until his case was called for trial, more than 10 days after his arraign- [fol. 23] ment, before demanding a copy of the indictment. By this conduct he waived his right to a copy,

and under the circumstances the court was under no duty to require that a copy of the indictment be furnished him."

Similar rulings were made by the Supreme Court of Alabama in *Evans* v. *State*, 62 Ala 6; *Shaffer* v. *State*, 202 Ala 243, 80 So. 81, and by the Supreme Court of Louisiana in *State* v. *Price*, 6 La. Ann. 691.

The petition herein reflects upon its face that the petitioner did plead to the information as same was read to him in open court. The transcript of testimony attached hereto reflects throughout that petitioner was well aware of the nature of the charge for which he was being tried; that he participated in the examination of witnesses and testified in his own behalf. Therefore even if we admit that no copy of the information was furnished the petitioner, the error, if error it be under the circumstances, would be absolutely harmless, and one upon which he could not prevail on appeal, and he is accordingly estopped from raising such point in habeas corpus proceedings.

In concluding this point, as a matter of precaution, it is suggested to the Court that the service of a copy of the indictment upon the defendant in a criminal case is not a judicial act, but an executive or ministerial act; and its [fol. 24] performance need not be shown as a matter of record proper as is the case of the indictment itself and of the orders of the court. Therefore, since a court record will seldom, if ever, reflect that a copy of an indictment was physically handed to a defendant, then to allow a convicted felon to prevail in habeas corpus proceedings on a blank allegation that he was refused such copy, would be to provide a most effective means of bringing about immediate relief to the present crowded conditions in Raiford.

## IV

Respondent denies that petitioner's constitutional rights were violated by the court's alleged refusal to appoint counsel in his behalf.

In this regard, the record reflects that no capital offense was involved; that the trial judge scrupulously protected the rights of the petitioner throughout the trial of this cause; that the petitioner effectively represented himself to the end that a verdict for a lesser offense was returned from

that with which he was charged; and the law on this point being so well settled in Florida, it is considered unnecessary to discuss this question further.

[fol. 25] V

Respondent denies each and every remaining material allegation in the petition herein.

WHEREFORE, respondent respectfully moves this Court to quash the writ of habaes corpus heretofore issued in this cause; to dismiss the petition heretofore filed and to remand petitioner to the custody of the respondent.

Respectfully submitted, R. O. Culver, State Prison Custodian, Respondent

Richard W. Ervin, Attorney General. Odis M. Henderson, Assistant Attorney General, Counsel for Respondent.

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CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 26] EXHIBIT "A" TO RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS

STATE OF FLORIDA

62823

April 22, 1958

UNIFORM COMMITMENT TO CUSTODY OF DIVISION OF CORRECTIONS

CRIMINAL COURT OF RECORD, POLK COUNTY, MARCH TERM, 1958

Conviction for ASSAULT TO MURDER IN THE SECOND DEGREE

Date of conviction February 26, 1958
Date of sentence imposed March 31, 1958
Term of sentence Twenty (20) Years

Case No. 19132

STATE OF FLORIDA, Plaintiff

vs.

ELIGAH MCNEAL, JR. alias LIGE MCNEAL, JR. Defendant

In the name and by the Authority of the State of Florida, to the Sheriff of said County and the Division of Corrections of said State, greeting:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of Information, judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the

institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

Witness the Honorable Roy H. Amidon
Judge of said Court, as also Robert J. Haslett
Clerk, and the Seal thereof, this the 1st day of April, 1958.
Robert J. Haslett, Clerk of said Court, by Earline L. Tucker, D.C. (Seal)

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

D of C Form No. 9

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[fol. 27] EXHIBIT "B" TO RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS

IN THE CRIMINAL COURT OF RECORD IN AND FOR POLK COUNTY, FLORIDA

No. 19132

STATE OF FLORIDA,

vs.

ELIJAH MCNEAL, JR. alias LIGE MCNEAL, JR.

ASSAULT TO MURDER IN THE FIRST DEGREE

The above entitled cause coming on this day for final hearing pursuant to the jury in this case having rendered a verdict of guilty on February 26, 1958 to the offense of Assault to Murder in the Second Degree, the Defendant appears before the Court for sentence to be pronounced upon him, and being asked by the Court if he had anything to say why the sentence of the law should not be passed upon him, offers nothing in bar thereto.

Therefore, the Court adjudges you, Elijah McNeal, Jr., alias Lige McNeal, Jr., to be guilty of the offense of Assault

to Murder in the Second Degree, for which you stand convicted by decision of the Jury, and it is the sentence, order and judgment of the Court that you, Elijah McNeal, Jr., alias Lige McNeal, Jr., for your said offense, be confined in the State Prison of Florida at hard labor for a term of Twenty (20) Years.

This March 31, A. D. 1958.

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[fol. 28] EXHIBIT "C" TO RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS

ARRAIGNMENT

Minute Book 45, Page 218

No. 19132

STATE OF FLORIDA,

vs.

ELIJAH MCNEAL, JR., alias LIGE MCNEAL,

ASSAULT TO MURDER IN FIRST DEGREE

The defendant in the above entitled cause appearing this day before the Court and being duly arraigned, admits identity and enters a plea of "not guilty" to the Information filed in said cause. Whereupon the Court Orders that this cause be continued until January 20, A. D. 1958.

[fol. 29] EXHIBIT "D" TO RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS

IN THE CRIMINAL COURT OF RECORD IN AND FOR POLK COUNTY, FLORIDA

Case No. 19132

STATE OF FLORIDA, Plaintiff,

vs.

ELIJAH MCNEAL, JR., alias LIGE MCNEAL, JR., Defendant

Trial of the above cause was held in the Criminal Courtroom, County Court House, Bartow, Polk County, Florida, on February 26, 1958, at 10:00 A.M. o'clock before the Honorable R. H. Amidon, Judge, and a jury. Appearances were Honorable Clifton M. Kelly, County Solicitor, for the plaintiff, the defendant in his own behalf, the witnesses, the Court Clerk and the Acting Court Reporter.

Thereupon, the following proceedings were had and taken:

ELLIX SCURRY having been produced as a witness on behalf of the plaintiff and having been previously sworn, testified as follows:

Direct examination.

By Mr. Kelly:

Q. Give us your name.
A. Ellix Scurry.
Q. Ellix Scurry. Where are you from?
A. Lake Wales, Florida.
Q. Now, do you know Lige McNeal?
[fol. 30] A. Yes, sir.
Q. All right, where is he?
A. Right there. (indicating.)
Q. How long have you been acquainted with Lige McNeal?
A. Ten to twelve years I've been acquainted with him.
Q. Did you have occasion to see him on the 10th day of November, 1957?

A. Yes, sir.
Q. Where did you see him at?
A. At the Blue Chip.
Q. Where is the Blue Chip?
A. Lake Wales.
Q. What county is that?
A. Polk County.
Q. County and state?
A. State of Florida.
Q. Tell us if anything unusual happened on that particular date when you saw him.
A. I was setting in the back trying to light a deep fryer, and——
Q. Talk louder, please. You were sitting in the back trying to light a deep fryer and what?
A. And he started——
Q. Who is "he?"
A. McNeal. And he started to say some bad language.
Q. Was that in the daytime or night time?
A. That was night time.
[fol. 31] Q. What did you say he did?
A. Started talking some bad, profane language.
Q. Explain what you mean by profane language.
A. Cussing.
Q. Was it of a mild nature or dirty?
A. About as dirty as I could think of. And I told him to either quit or go out of the place.
Q. Was there other people in there?
A. Yes, sir, a lot more people. And he told me to hell with me—in a way of speaking—and he say, "Any where I be at——"
Q. He said what?
A. He said, "I'll say anything I want to anywhere I be at." And I got up and walked around the counter to where he was at, and I told him I wasn't going to have none of that, that there was nothing for him to do but get out of the place.
And we was tied up a little bit then. And after a lick or two was passed, he walked on out; and it was about——
Q. He walked on out of your place?
A. And about fifteen minutes after then—I've got a cold—I forgot about it until I saw what looked like a blaze in my face.

Q. You say you saw a blaze of fire in your face?

A. That's right.

Q. What else besides the blaze of fire you saw in your face did you see?

A. I seen him with a shotgun, but I'd already went back in the place.

[fol. 32] Q. You see him with the shotgun?

A. Yes, sir.

Q. Who had the shotgun?

A. He did. (indicating)

Q. How far was he from you at that time?

A. About as far as from here to the benches.

Q. About as far as from where you are to here?

A. That's right, about that distance.

Q. For the purpose of the record, it is estimated to be about fourteen feet. Is that right?

A. That's about the distance.

Q. Was anyone else standing there or seated where you were located at your place when he came back?

A. Well, I was so excited so much I didn't have time to see who was there, because I turned and went back in the building as quick as I could.

Q. You turned and went back in the building?

A. I didn't even see the boy that got shot until it was all over there.

Q. When he left there, did he say anything to you before he left?

A. He didn't say anything. He didn't say he was coming back. He just left.

Q. When you looked up and saw him with the shot gun, how long after you'd seen him with the shotgun before you saw the blaze in your face?

A. That's the first thing I seen was the fire. He missed [fol. 33] me, and I whirled and went back in the building, and I noticed him then, and I went on back in the building.

Q. You noticed him then?

A. That's right.

Q. Did you say anything?

A. I didn't have time, because I wasn't there but a minute or a second.

Q. You went back in?

A. Yes, sir.

Q. Did you talk to him any more that night?

A. No, sir.

Q. What did you do after he fired the shot there?

A. Well, I was at that place peeping out, and he went across the street into this building, condemned building.

Q. He went across the street?

A. Yes, sir.

Q. Did he take the gun with him?

A. Yes, sir.

Q. How far was he from the place you peeped out, if you know?

A. As far as the door. I didn't look out the door; I was looking out of the glass there. I wasn't right at the door.

Q. Did you recognize him after you got back in?

A. I recognized him before I got back in there.

Q. That it was Lige: that he was the man?

A. Yes, sir.

Q. When you saw the flash of fire, did you hear anything?

[fol. 34] A. The gun went off.

Q. You heard the noise of a gun. Are you acquainted with the noise of a gun?

A. I got excited right then.

Q. It sounded like a shotgun?

A. I know it was shotgun, because I seen it.

Q. After you went back out, the first thing you noticed was this man here?

A. That's right.

Q. There was some other people around there, wasn't there, on the sidewalk?

A. There was a lot of people on the street, but that time I don't know anybody personally.

Q. Do you know of any other Ellix Scurries down there?

A. Do I know any other Ellix Scurry? I don't know but one of them.

Q. Do you know of any other Ellix Scurry down there in Lake Wales?

A. No, sir.

Q. All right.

Mr. Kelly: That's all.

The Court: Now, Lige, do you want to ask him anything about what he has said here?

Defendant: Yes, sir.

The Court: All right, go ahead and ask him anything you want to about what he's said.

[fol. 35] Cross-examination.

By the Defendant:

Q. You said you were the one that come back there and told me to stop cursing, but now was your brother in there, Ernest?

A. Yes.

Q. Wasn't he the one that come back there?

A. He was the first one that come back, but I come back that time.

Q. You said you hit me, but Ernest was the one that hit me.

The Court: No, that is testifying and it isn't time for you to testify. You want to ask him, "Did you hit me?" Let me ask him this.

In other words, you and your brother both were there, and you went back and talked to him?

A. Yes, sir, Ernest went back first and I called Ernest back because I knowed he was going to get mad. And he got me hot. I'm the one that hit him.

The Court: Did he have a gun or anything with him when he was in there that you know about?

A. No, sir.

The Court: All right, Lige, you want to ask him anything else?

Defendant: No, sir.

(Witness excused.)

[fol. 36] GEORGE FIELDS having been produced as a witness on behalf of the plaintiff and having been previously sworn, testified as follows:

Direct examination.

By Mr. Kelly:

Q. Give us your name, please.

A. George Fields.

Q. Your occupation?

A. Police officer, City of Lake Wales.

Q. How long have you been working with the City of Lake Wales as a police officer?

A. Two years and three months.

Q. All right, now, and you are still so employed now, aren't you?

A. Still so employed.

Q. On the 10th day of December, were you on Duty or off duty?

A. I was on duty.

Q. Where were you in Lake Wales, what place, officer?

A. On that particular night I was parked on the street there at the station where I usually park.

Q. How's that?

A. I was parked on the street there at the station.

Q. In other words, you have a station there near the stores and you were there?

A. I was there.

Q. With reference to the place of business where Ellix Scurry works, how far was that from the place where you were?

[fol. 37] A. About three quarters of a block, I'd say.

Q. About three quarters of a block.

A. Well, it's from C to B, and he's about two buildings, the building just off B Street.

Q. Very close by?

A. Very close by, just off Lincoln Avenue.

Q. Now, that night did you hear anything unusual?

A. Yes, sir, I did.

Q. What time of night did you hear this unusual noise?

A. I'd say between eight and eight-thirty, somewhere along there.

Q. What was this unusual noise?

A. It was a blast from a shotgun.

Q. All right, tell us what you saw and what you did when you heard this blast.

A. Well, when I heard this blast, for a minute I thought one time it was a fire cracker; but I got out of my car and whirled down the street, and I saw this McNeal.

Q. Is that him right there?

A. (Witness nods head up and down.) And I yelled, "McNeal." And he crossed the street with the shotgun in his hands and he went straight into a deserted building, an old three-story building and barricaded himself in there. And some one else yelled and said, "Don't go in there; he's got a shotgun." And I had noticed he had a shotgun. I got a couple of cars to be in between me and him.

The first time I yelled, he said, "I got a gun." And I [fol. 38] said, "I know you have," and I said, "Come on out, I've got the place surrounded."

And about three minutes after I demanded him to come out, he came out with the shotgun in his hand, and he unlocked it and a shell came out, which I wasn't able to find. And I casually walked up to him taking my time and he stood there with the gun lying on the sidewalk.

Mr. Kelly. Mr. Clerk, will you mark this For Identification?

. . . The exhibit above referred to was marked For Identification State's Exhibit 1.

Q. I show you now State's Exhibit 1, and it is numbered one For Identification, and I ask you have you seen this Exhibit before?

A. Well, it had this tape around it and it was wired with this piece of wire.

Q. Is that the shotgun?

A. It looks very much like the shotgun. I mean, we have three or four shotguns put up sort of like this, but this looks very much like the shotgun I took from Lige McNeal.

Q. Was it a single barrel?

A. Single barrel shotgun.

Q. Now, officer, what did you do with the shotgun after you took it off him that night? Did you take it off him?

A. Well, I picked it up. I walked in front of him and picked the gun up, and I said, "McNeal, you're under [fol. 39] arrest." And he said, "I know I am."

And so I brought him across the street to where Ellix Scurry was and noticed this other boy was shot in the front of the leg. And I demanded somebody to take him to the hospital immediately.

And he and Scurry got into another argument while I was trying to get the boy to the hospital. He was cursing Scurry again.

Q. Who was, McNeal?

A. McNeal. And I caught him by the arm and said, "You'll have to learn better than that." He said, "Turn me loose, I'm not scared of your damn pistol."

And I said, "McNeal, you're going with me," I said, "You're still under arrest," and I said, "Let's go." And I gave the other boy the shotgun to keep. I didn't know what was in McNeal's mind, but I wanted to be ready.

And by the time I took him around to put him in the car, officer Earl Branch and Lt. Daughtry came along, and I put him in the other police car, and we carried him on to jail.

Q. Now, what, if anything, did Lige McNeal tell you about Ellix Scurry?

A. Well, on our way to the station we told McNeal what had happened and what he had did. He said he was sorry he shot these others boys, he intended to kill Scurry, and he said, "I'll still do it."

Q. Let's get this straight now. He said he was sorry [fol. 40] he shot the other boy?

A. He said, "I'm sorry I shot the other boy; I intended to kill Scurry, and I'll still get him."

Q. What Scurry was he talking about?

A. Well, both the brothers; he didn't like the way he was treated in the place.

Q. Well, now, this other fellow that was shot there that night, was he shot pretty bad?

A. Pretty bad. I believe he was in the hospital about three days; the front of his leg was shot.

Q. Bird shot?

A. I think so. There was four shot at Lige's that night; and when he finished, this one, I understand, was shot pretty bad. And then we got a call there was three others shot.

Q. Bird shot?

A. Bird shot; one was hit in the face once or twice.

Q. They all were shot right in front of that place?

A. That's right.

Q. Now, the one that was shot so bad, he hadn't moved out of his tracks?

A. He hadn't moved out of his tracks. He was sitting on the bench and he didn't move. He just remained almost frozen to the bench. When I found him he was bleeding and I just demanded that some one rush him on to the hospital; and so they did. And after we finished booking McNeal, the Lieutenant and I went on out to the hospital. [fol. 41] Q. But he apologized for shooting the other fellow?

A. Of course he said he didn't intend to shoot the other boy naturally, but he did intend to kill Scurry.

Q. How many times did he say he shot?

A. Well, he didn't say. He didn't say how many times he shot.

Q. All that happened in Polk County, Florida, didn't it?

A. It all happened in Polk County, Florida.

Mr. Kelly: That's all.

The Court: All right, Lige, do you want to ask him anything about what he's said?

Defendant: No, sir; no, sir.

(Witness excused.)

EARL BRANCH having been produced as a witness on behalf of the plaintiff and having been previously sworn, testified as follows:

Direct examination.

By Mr. Kelly:

Q. Give us your name, please.
A. Earl Branch.
Q. Your occupation?
A. Police officer, City of Lake Wales.
Q. Officer, do you know Lige McNeal, this man here?
A. Yes, sir.
Q. Did you have occasion to see him on the 10th of December, 1957?
[fol. 42] A. Yes, sir.
Q. Where did you see him?
A. Saw him in the colored quarters.
Q. What was your occasion for seeing him there?
A. George Field had him in custody and was fixing to bring him up to jail, and I stopped and asked him what the trouble was. He briefly told me and I said, "Put him in the car and we'll take him up there."
Q. Did you have any conversation with Lige McNeal?
A. Yes, sir. I asked him about what he'd shot that boy for, and he said he shot the wrong man and he was sorry about shooting this guy that caught the shot in the leg; Scurry was the one he was after; he didn't like the way he treated him and wanted to kill him.
Q. Wanted to kill him?
A. Yes.
Q. Did he tell you how he came into possession of the shotgun?
A. Yes, sir; he told about going there and about getting thrown out, and cussing, and he went home and got the gun; said he throwed it out the window.
Q. Said he went and got it?
A. Yes, sir.
Q. Did you see the shotgun?
A. Yes, sir; I took the gun and turned it over to the deputy sheriff. Yes, sir, that's the same one.

Q. That's the same shotgun?

[fol. 43] A. Yes, sir.

Mr. Kelly: Your Honor, I want to introduce this in evidence as an Exhibit for the State.

The Court: Be admitted in evidence.

. . . The shotgun above referred to was received into evidence and marked State's Exhibit A.

Q. Did you have occasion to determine whether or not Lige McNeal had sort of been drinking that night?

A. He had the smell of alcohol on his breath.

Q. Have you had an opportunity in your lifetime to observe people who are under the influence of liquors, wines or beer?

A. Yes, sir.

Q. Did you form any opinion that night as to whether or not he was under the influence of intoxicating beverages?

A. He had been drinking, but he wasn't under the influence to where his normal faculties were impaired visibly.

Q. Just drinking; you could smell it.

A. Yes, sir.

Mr. Kelly: That's all.

The Court: Lige, you want to ask him anything about what he has said?

Defendant: No, sir.

(Witness excused.)

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[fol. 44] Don Neal having been produced as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kelly:

Q. Your name, please?

A. Don Neal.

Q. And your occupation?

A. Deputy Sheriff, Polk County.

Q. You work under Sheriff Hagan Parrish?

A. Yes, sir.

Q. Now, on November 10, 1957, you were a deputy sheriff that night, weren't you?

A. Yes, sir.

Q. Did you on that night have occasion to see Lige McNeal?

A. If I recall correctly it was at the police department after all this happened.

Q. Did you talk to him?

A. I took some information for him, yes, sir.

Q. What did he tell you about that incident up there?

A. He told me about having the argument at the Blue Chip there with Scurry; and he told me that he blacked out; he didn't recall anything from the time he left after the argument at the Blue Chip until Officer Fields had him.

Q. Came and got him out of that building?

A. Yes.

[fol. 45] Q. During all this period of time did he say what happened?

A. He told me he blacked out.

Q. Did he give you any reason why he blacked out?

A. No, sir.

Q. Did you go back out there and look around out there and determine what pattern those shots went outside of that building?

A. Yes, sir.

Q. What was the pattern?

A. There was a post—There is a kind of a shed or port type roof out over the sidewalk in front of the Blue Chip Drive-In, where the argument took place.

Q. There was a post starting at the roof onto the sidewalk?

A. Yes, sir. There were pellet marks all up and down I'd say from the sidewalk up three feet—pellet marks all around the post from the sidewalk were the stray shot had hit the post.

Q. That bench where this fellow was standing or sitting, he would get the whole load in his lower limbs? Or where was the pellets there in regard to the bench?

A. I couldn't see any. The bench, as you know, is there close to the post which was only a matter of four or five feet from the bench, I would estimate.

Q. Did you ever find an empty shell that night?

A. No, sir, he looked for it that night, Officer Fields looked for it that night, and I looked for it that morning.

Q. Now, that shotgun, it was turned into the Lakeland [fol. 46] Police Department to you, wasn't it?

A. Yes, sir.

Q. And you brought it over here to Bartow?

A. Yes, sir.

Q. Is this the shotgun that was turned over to you?

A. Yes, sir.

Q. Same condition and everything?

A. Yes, sir.

Mr. Kelly: All right, Your Honor.

The Court: Lige, do you want to ask him anything?

Defendant: No, sir.

(Witness excused.)

Mr. Kelly: The State rests its case, Your Honor.

The Court: All right, now, Elijah, that is the State's case. If you want to, you can take the stand and tell your side of it. If you don't want to, you don't have to; because the burden is on the State to prove your guilt and not upon you to maintain your innocence. If you don't take the stand and testify, I will instruct the jury that they cannot consider that as any evidence of your guilt whatsoever. If you do take the stand and testify, then the State has a right to cross examine you. Do you want to tell your side of it?

Defendant: Yes, sir.

The Court: All right.

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[fol. 47] Elijah McNeal, alias Lige McNeal having been produced as a witness in his own behalf and having been previously sworn, testified as follows:

Defendant:

Q. Is he going to ask me questions?

The Court: No, you just go ahead and tell your side of it.

Q. I'll just start from the time of the argument inside the place: I was sitting at the bar, at the counter, drinking

a beer that girl that was working there had sold me; and E. S. and his brother were on the other side of the building there fixing a stove or something behind a counter there.

And I was teasing this girl about a boy that she'd gone dancing with in the place that evening and—Well, it wasn't no real bad cursing and he'll say the same thing. And some of those words were—well, they was not too bad.

And Ernest walked over there and said, "McNeal, I want you to stop cursing in my place." And I said, "Man, I don't even have to come in the place." And I said, "As soon as I finish drinking my beer, I'll leave."

And I turned around on the stool I was sitting on and I finished drinking the beer, and Ernest hit me. And E. S. run up. And I hit him. And he said, "I'll take care of this." He said, "That's all right, turn him loose. I got him."

And I'd dropped my cap and he handed me my cap and I walked on down the street. I don't know if I went home or [fol. 48] where. But from that time on the next thing I remember was George Fields calling me and I was standing back there in that building without no shirt and no shoes and I had the shotgun.

Now, whethere me knowing whether I fired the gun or not, I don't know that part is a complete blank to me. I have been to the hospital at Bay Pines for some wounds I received in the army, a head injury. I have occasionally, when I get excited or over-headed, blanked out.

And it was the 8th of April, 1956, that I went over for treatment and stayed over there six months; and they sent me a paper that stated it was service connected and I could come to the hospital any time. And I lost that, and can I give you that one? (Handing paper to the Judge.) That paper is a statement from the doctor that examined me before I went to the hospital, and he give me that to bring over. It is a statement that I do have occasion to have blackout spells.

The Court: This statement would not be admissible. You could put the doctor on and have him testify; but we cannot admit any statement like this. We will allow you to testify about it.

Q. But I ask the mercy of the Court. I didn't at any time intend to kill anybody.

I was in the army for almost six years, and I made expert

with just about every weapon I fired, even a shotgun; and if I'd intended to kill a man, then I believe I would have [fol. 49] killed him. I was trying to scare them and stop them from jumping on people.

Cross-examination.

By Mr. Kelly:

Q. You say you were trying to scare him?

A. I say I must have been trying.

Q. Well, now, Lige, how much beer had you had to drink that night?

A. Well, I think it was three cans, three small cans.

Q. Had you had any liquor to drink that day?

A. No, sir.

Q. Now, that blackout trouble you say you have, does that bother you most when you drink beer or when you don't drink beer?

A. Well, I could be working and get too hot, or when I gets excited, I blacks out.

Q. I didn't ask you that. I asked you when you drink beer, does that have any effect on your nervous condition, the blackouts? Does that beer have a tendency to make that condition be more severe?

A. I don't think so, sir.

Q. There is no connection between the blackouts and the beer?

A. No, sir.

Q. Is this your shotgun?

A. It's my father's.

[fol. 50] Q. Is that your shotgun?

A. Yes, sir.

Q. Now, will it shoot?

A. I think so.

Q. How's that?

A. I—They said I had it that night, so I guess it will.

Q. Did you have that shotgun that night?

A. I had it because I throwed it down myself.

Q. When you came out of that building, you had this shotgun?

A. That's right.

Q. Now, what use did you have with a shotgun there in that building, Lige?

A. I don't know, sir.

Q. Now, was you mad?

A. Now sir.

Q. Were you mad at Ellix Scurry?

A. No, sir, I wasn't mad with anybody at that time.

Q. How long a time—how many minutes elapsed from the time you left that Blue Chip that night after they had, you say, throwed you out about that cussing, how much time elapsed from that time to the time you say the next thing you remember when you come out of the building with the shot gun and Officer Fields took the gun away from you? How much time did it take?

A. I don't know, sir.

Q. Do you have any idea?

[fol. 51] A. No, sir, I don't know where I went after I left.

Q. Where is the normal place for that shotgun? You say it belonged to your daddy. Where is that shotgun kept?

A. It's kept in a room with a twenty-two rifle I got to the house.

Q. It was kept in a room at the house where you were living?

A. Yes, sir.

Q. Do you live with your father, or is he not living?

A. He died the 20th of December.

Q. He was living at that time?

A. Yes, sir.

Q. Did you know when you went down there—Did you have the shotgun when he throwed you out there for cussing? Did you have the shotgun at that time?

A. No, sir.

Q. Did you go get it?

A. I must have.

Q. Did you have it in that old building out there or did you have it at your house?

A. I didn't bring no weapon down the street with me. The reason for me being down the street was to go over to Lakeland. I had give a boy two dollars to take me over there. And he got sick and I went upstairs and I told him I would wait around over there on him. There was a dance and I was going to get a girl.

Q. You were going to give a boy two dollars to take you to Lakeland?

[fol. 52] A. I was going over there, yes, sir.

Q. And you hadn't left to go to the dance?

A. No, sir, I hadn't.

Q. Was this Saturday or Sunday?

A. Saturday.

Q. Where was the dance going to be?

A. American Legion Hall.

Q. Now, Lige, after Officer Field got you out of that building and you said you let him have that shotgun, did you have another argument, some more words with Ellix Scurry in the presence of Officer Fields?

A. When I come across the street, it wasn't in front of the Blue Chip, it was in front of the cleaners.

Q. That was after Officer Fields arrested you, wasn't it?

A. Yes, sir.

Q. You had some more words with Scurry?

A. Yes, sir, on the street and in the car.

Q. Did you see them people that had been shot?

A. Yes, sir.

Q. What was the gun loaded with?

A. I don't know.

Q. Bird shot?

A. I don't know, sir.

Q. Now, when you come out from that building and the officer told you to unbreach that gun, did an empty shell [fol. 53] jump out, or a good shell?

A. It was an empty shell, because I couldn't get it out.

Q. When did the shell that was empty, when was it put in that gun?

A. I don't know.

Q. How's that?

A. I don't know.

Q. When was the shell—you say it was an empty hull that jumped out of the gun when the officer got out there and told you to unbreach it—when was that shell fired?

A. I don't know, sir.

Q. You don't know. At the place where you live with your mother, was the gun kept on a rack?

A. It is kept in the closet in my room.

Q. Kept in the closet in your room. Do you remember going to get it that night?

A. No, sir.

Q. It was in your room and it was your daddy's gun?

A. See, that's a big family of his, and the gun and the rake and the lawn mower, and they keep it in my room because nobody sleeps in my room but me.

Q. Now, that gun, as a rule, was it kept loaded or unloaded?

A. Unloaded.

Q. So you don't know how that empty shell got in that gun?

A. No, sir.

Q. Did you have any empty shells at your house, bird shells?

[fol. 54] A. I guess there's about three.

Q. Where's that?

A. In the closet, in a coat pocket hanging in there.

Q. In that room where you are at?

A. No, sir.

Q. Your daddy's coat pocket?

A. Yes, sir.

Q. How much do you weigh, Lige?

A. Well, I weigh now 191.

Q. 191 pounds?

A. Yes, sir.

Q. How much did you weigh then?

A. I don't know.

Q. 210?

A. Something like that.

Q. How tall are you?

A. Six-two.

Q. How old are you?

A. Twenty-nine.

Q. Are you married or single?

A. Single.

Q. Have you learned—when you were in the Army you were told about guns would kill people, weren't you?

A. Yes, sir.

Q. Do you have what is normally referred to as a bad temper?

A. Repeat that, sir.

[fol. 55] Do you have a bad temper? By that I mean do you just go out of your head when you get mad?

A. No, sir.

Q. Now, when Scurry hit you that night, did you get mad?

A. No, sir.

Q. You just said, "okay." Is that what you said?

A. And walked out of the place.

Q. Now, had you been cussing in there?

A. I had said three or four words, and if these ladies weren't present, I'd tell you what I said.

Q. What you said is not for ladies to hear. Is that right?

A. Ladies can hear it, but I mean——

Q. You knew it was wrong, didn't you? It's not polite. Is that right?

A. Well, it all depends on who you're talking to.

Q. Well, there were some colored women in there, weren't there?

A. They was cooking in there, wasn't talking to me.

Q. And that is his place of business?

A. It belonged to Scurry.

Q. You said you got a head injury, when did you get this head injury?

A. In 1952.

Q. Do you draw an army pension or something?

A. I draw compensation for the school, but the pension was cut off.

Q. In other words, you are okay as far as the government is concerned?

[fol. 56] A. I goes and gets pills.

Q. But you don't get any money?

A. Yes, sir, some.

Q. You say your disability was cut off and you don't draw a pension now. It that right?

A. Now, what time was this? I think——

Q. Don't tell me what you think; tell me what you know.

A. When I was in the hospital, I stayed over there four months locked in the ward, psycho part of it; and the four months I was over there, I had to stay in there locked up all the time. Mama was the only one that could come and see me. And, well, about the latter part of the four months he give me a weekend pass. He was trying me to see if I would come back.

And I went home and I come back on time. And I asked mama to come and sign for me as that was the only way I could get back. I had to have a guardian to sign. And she

come over there that day and begged the doctor to let me go home.

Q. You work anywhere, Lige?
A. Sometimes.
Q. What kind of work do you do?
A. I work at the nursery, Lake Garfield.
Q. Usually do reasonable work?
A. Something, not too hard.
Q. You know how to go to Lakeland?
A. Yes, sir.

[fol. 57] Q. You know a shotgun will kill you, don't you?
A. I guess everybody knows a shotgun will kill you.
Q. How's that?
A. I guess everybody knows a shotgun will kill you.

Mr. Kelly: That's all.

(Witness excused.)

The Court: Now, Lige, if you had an attorney, he would argue the case before the jury, what is called the opening argument and the closing argument. You can get up and talk to them first and then State will argue and then you will have the closing argument, if you wish to argue to them, plead your case.

Defendant: Well, sir, I don't quite understand the meaning of that.

The Court: Well, suppose you let the state make their argument and you listen now, pay close attention to what Mr. Kelly has to say for the State, and then you can get up here and answer him.

(Mr. Kelly argued on behalf of the State.)

The Court: Now Lige, do you want to make any argument to them?

Defendant: No, sir.

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[fol. 58] REPORTER'S CERTIFICATE TO FOREGOING TRANSCRIPT
(Omitted in printing)

[fol. 59] [File endorsement omitted]

IN THE SUPREME COURT OF FLORIDA

[Title omitted]

PETITIONER'S REPLY BRIEF—Filed May 23, 1959

To the Supreme Court:

In the Respondent's return, he denies petitioner requested a copy of the Information, and he in his return argues that failure to give petitioner a copy of the information, in compliance with section XI, Declaration of Rights, Florida Constitution, was a harmless error.

The Attorney General argues the petitioner was not entitled to a copy of the information, *Because*, petitioner pleaded not guilty to the charges, and understood said charges, and did in fact defend against said charges. We find the Attorney General arguing the framers of the Florida Constitution did not intend for a defendant to be furnished a copy of the information, when they said, "*And shall be furnished with a copy of the Indictment against him.*" If the defendant pleads not guilty, or knows what he is charged with, or defends against the charge. Such reasoning is unheard of, especially by a scholar of the law. The Declaration of Rights Section XI, doesn't say you waive your rights if you defend or know what you are charged with. The Attorney General argues the State of [fol. 60] Florida can violate one of the most indispensable parts of Due Process of Law, and then call it harmless error. I ask this Honorable Court, this question. If a defendant failed to give *Notice of Appeal*, would the defendant be allowed to Appeal? Certainly not, because law has rules of procedure that must be complied with. And when one side violates those rules it becomes an illegal procedure.

The United States Supreme Court said in, "Twining v. New Jersey, 211 U.S. 78, that Due Notice was an indispensable part of Due Process of Law. Yet the Attorney General of Florida, says it is only harmless error. This Honorable Court has also held in "Lee v. State, 155 So. 123, that Due Notice was one of the requirements demanded by the constitutions, yet the Attorney General of Florida,

says it would be harmless error to disregard what the *Constitution Commands.* This Court said in "Messer v. State, 120 Fla. 95, that no intentional or unintentional frittering away of the Constitutional privileges should be tolerated. Therefore the right to be furnished a copy of the information, being a *Constitutional Right,* it is a burden upon this Court to uphold this right. The Attorney General has tried to make excuses for not furnishing the petitioner with a copy of the information. I am sure this Honorable Court will agree, that of all human inventions, the most worthless is an excuse.

The information charges petitioner with assault to murder in the first degree, one Alex Scurry, the transcript of [fol. 61] testimony shows there was testimony interduced by the State concerning other crimes not charged in the information, of which the petitioner was not on trial for. Such testimony was very prejudiced toward the defendant, and would seriously damage the petitioner in the eyes of the jury. On page (6) of the trial transcript, State witness Alex Scurry, said "I didn't even see the boy that got shot until it was all over there," On page (13) of the transcript State witness George Fields said, "And so I brought him across the street to where Ellix Scurry was and noticed this other boy was shot in the front of the leg. And I demanded somebody to take him to the hospital immediately" On page (14) of the trial transcrip. we find Officer Fields still testifying under the directions and leading questions of the County Solicitor, "A. He said I'm sorry I shot the other boy; I intended to kill Scurry, and I'll still get him," "Q What Scurry was he talking about? A. Well, Both the Brothers; he didn't like the way he was treated in the place. Q. Well, now, this other fellow that was shot there that night, was he shot pretty bad? A. Pretty bad. I believe he was in the hospital about three days; the front of his leg was shot."

On page (4) of the transcript the testimony shows the witness Alex Scurry claims the petitioner tried to kill him at his place of business known as the Blue Chip in Lake Wales. And the information charges such. Now who was the boy that was shot? Why didn't the County Solicitor charge the petitioner with that crime? If the petitioner shot the *boy.* It should be remembered the witness Scurry said he *was not shot.* That the petitioner hit him with his

[fol. 62] fist in the Blue Chip, and that the petitioner did not have a gun.

Next we find on page (14) of the transcript, State witness Officer Fields said. "A. I think so. There was four shots at *Liges* that night; and when he finished, this one, I understand, was shot pretty bad. And then we got a call there was *three other's shot.*"

Who are all these people that got shot? And where is *Lige's?* is it in Polk County? Why didn't the County Solicitor charge the petitioner with these crimes in the information, and name the people that got shot.

It seems the petiti-oner and the complaining witness had a fist fight, and later the petitioner discharged a shot gun in the vicinity of the Blue Chip, and the witness Scurry decided he would say the petitioner shot at him. And the County Solicitor introduced evidence of all the shootings that happened around Polk County, Florida, and by doing so he would prejudice the Jury toward the petitioner to the extent they would convict the petitioner, for a crime that really didn't happen.

This record supports this fact, because witness Scurry said the petitioner shot point blank at him from a distance of 14 feet with a shot gun and did not hit him.

This record shows on page (22) the petitioner was an expert marksman with fire arms, that he (petitioner) spent 6 years in the army as a sharp shooter, and had training in the use of shotguns. Therefore, it is not unreasonable to assume that if petitioner intended to shoot the witness Scurry he would have hit him.

[fol. 63] Such a conviction as this well not stand, because the State had no right to bring up crimes not shown in the information. It is plain the Solicitor and trial Judge was taking advantage of the petitioner's lack of knowledge of how to defend himself and the trial Judge would not appoint counsel to defend petitioner. Such procedure violates the rule laid down by the United States Supreme Court in 337 U.S. at 381.

And this Honorable Court has just been reversed by the United States Supreme Court, in "Cash v. Culver, because the State allowed testimony about other crimes not charged in the information. (Where the defendant did not know how to defend against such evidence) Justice Steward, said in "Cash v. Culver, "The problems which this testimony

raised were thus beyond the kin of a layman, and it was clearly the kind of testimony that could seriously damage a defendant in the eyes of a Jury".

There is no dispute between the record and these facts, because the record clearly shows such testimony went before the Jury. With the sanctions of Judge Roy H. Amidon. Petitioner will rely on the opinion handed down by the U.S. Supreme Court in Cash v. Culver, to support his views on this point.

This record shows the day this so called crime was committed the petitioner was released from the Sympathetic Ward at Bay Pines, See, page 30 of the transcript. The Government had the petitioner locked up in a mental ward for the past six months See page (22) of trial transcript.

The petitioner showed the trial Judge, statements from Doctors to support that fact. (T.R. (22). The Judge ruled the statements was inadmissible, (TR) (22). Judge Amidon [fol. 64] said petitioner could put the Doctor on the stand and have him testify. (TR)(22).

This record shows this is just another one of Judge Amidon's trials where he utilized dictorial criminal procedure and punishment to make a scapegoat of the weak.

Any competent trial Judge, would have appointed counsel, under the circumstances of his case. And then counsel would have obtained a mental examination of the petitioner's state of mind to see if he was fit to stand trial, surely he was not able to defend himself on the facts, disclosed. This would of been possible under Section 917.02 Appointment of Expert Witnesses to examine petitioner. Or under Chapter 394.

Florida law provides ample procedure for the guidance of the trial Court, and in this instance it was not used.

The duty of the Court was to protect this petitioner's rights, and the trial Court lost jurisdiction, in not appointing counsel to defend this petitioner. The record speaks for itself. See Uveges v. Penn. 355 U.S. 437, 441. Also See Gibbs v. Burke, 337 U.S. 773. Rice v. Olson, 324 U.S. 786. Townsend v. Burke, 334, U.S. 736. Also See Zellers v. State, 189 So. 236, 138 Fla. 158. Also See Sneed v. Mayo, 66 So. 2 D, 865.

The Attorney General has come before this Court and argued the record reflects the trial Judge scrupulously pro-

tected the rights of the petitioner. Such argument is an insult to the intelligence of the Justices of this Honorable Court, and the Attorney General, argues the petitioner effectively represented himself to the end that a verdict for a lesser offense was returned.

[fol. 65] The record shows the petitioner ask three questions, and one of the three was not ask proper. See page (9) of the trial transcript. This record shows the petitioner was an ignorant tongue tied defendant that did not know Court procedure, See Page (31) of trial transcript. The petitioner could not talk to the Jury, and did not. And did not cross-examine the State Witnesses.

This Court can see what Judge Roy H. Amidon, said to this ignorant mentally unbalanced negro man, on page (31) of trial transcript.

Such a Judge, cannot be respected or respect himself that will set and hear such a trial. See Betts v. Brady, 316 U.S. 463, 62 Sup. Ct. 1257.

No selfrespecting Judge would entertain to try a man who has shown evidence of prior or present insanity. Without following the proper procedure provided by the State for such defendant's. The Jury was entitled to all the facts.

Wherefore, the writ of Habeas Corpus as prayed for should be granted and petitioner discharged from this unlawful custody, on the proof that the trial Court lost Jurisdiction in the proceedings above.

Petitioner shall ever pray, humbly.

S Elijah McNeal, Jr., Box 221, Raiford, Florida.
# 62823.

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Certificate of Service (Omitted in Printing)

[fol. 66] IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A.D. 1959

Case No. 29,750

ELIJAH MCNEAL, JR., Petitioner,

vs.

R. O. CULVER, as State Prison Custodian, Respondent

OPINION—Filed July 1, 1959

A case of original jurisdiction—Habeas Corpus.

Elijah McNeal, Jr., in Proper Person, Petitioner.

Richard W. Ervin, Attorney General and Odis M. Henderson, Assistant Attorney General, for Respondent.

THOMAS, C.J.:

Upon the representation of the petitioner that he was denied the services of an attorney when he was placed on trial for assault with intent to commit murder in the first degree and was refused a copy of the information charging him with that offense, the court issued a writ of habeas corpus directing the respondent to make a proper return.

The matter is now ready for disposition on the writ and the answer of the respondent, prison custodian, that the petitioner is held under a commitment issued 1 April 1958 by the Judge of the Criminal Court of Record for Polk County, Florida, ordering him safely to keep and confine the [fol. 67] petitioner for 20 years. Made a part of the return is a photostatic copy of the testimony produced at the trial and parts of the record necessary to an understanding of the procedure such as the minutes showing arraignment and judgment of the court.

Nothing whatever appears in this record of the trial to show whether or not any request was made of the trial judge to appoint counsel to aid the petitioner in his defense. No obligation is put upon a trial judge by statute to appoint an attorney for an accused except in capital cases. Sec. 909.21, Florida Statutes 1955, and F.S.A.; Johnson v. Mayo, 158 Fla. 264, 28 So. 2d 585, cert. denied, 329 U.S. 804, 67 S. Ct. 492, 91 L.Ed. 687; Johnson v. Mayo, Fla. 40 So. 2d 134, and no absolute responsibility rested on the

judge trying the case to inquire about the wish of the defendant to have the services of legal counsel, Bute v. Illinois, 333 U.S. 640, 644, 68 S. Ct. 763, 92 L.Ed. 986, although we have recognized the practice of asking a defendant whether or not he desired a lawyer and of providing one if that was his wish. Sneed v. Mayo, Fla., 66 So. 2d 865.

Not only was there a lack of evidence in the record indicating that the petitioner was unable to defend himself but circumstances are reflected showing that we should indulge the presumption that the contrary was the case. The charge was simple and so was the evidence introduced to support it.

After the petitioner had an altercation with the proprietor in an establishment that appears to have been a 'jook', called the "Blue Chip", he withdrew to his quarters, and, more effectively to renew the feud, reappeared armed with a shotgun loaded with fine shot. When he was within range of his late adversary he fired missing his target and wounding four other persons. His aim was wretched despite six years service in the army where, he says, he became a sharpshooter.

At the time of his trial he was 29 years of age.

So it cannot accurately be said that the issues were so complex, or the petitioner was so young, ignorant and in-[fol. 68] experienced, as to bring into play the exception to the rule requiring appointment of counsel only in capital cases and to require further inquiry into the procedure culminating in his conviction and sentence. Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989, 89 L.Ed. 1367; Uveges v. Pennsylvania, 335 U.S. 437, 69 S. Ct. 184, 93 L.Ed. 127; Sneed v. Mayo, supra; Butler v. Culver, opinion filed 17 April 1959.

The petitioner next badly stated that he was denied a copy of the information but there is nothing in the record from which it could even be inferred that this right guaranteed him by Sec. 11 of the Declaration of Rights of the Constitution of Florida was violated. There it is provided that "[i]n all criminal prosecutions, the accused shall * * * be furnished with a copy of the indictment against him." Unquestionably it is the duty of a trial court to be sure that in every instance this copy of the formal accusation be given to the defendant. Should failure to observe the mandate in the Declaration occur, the defendant can demand compliance, Sec. 906.28, Florida Statutes 1957, although the

duty is primarily one of the court. And it would probably be wise for the court minutes to show in each instance that such a copy had been delivered.

This right, however, is one that may be waived, Howard v. State, 146 Ala. 149, 41 So. 301. We presume that in the instant case the court performed the duty placed upon it by the Constitution. Even without this presumption the petitioner cannot prevail on this tack. He was arraigned and plead not guilty; more than a month later, 26 February 1958, he was convicted, incidentally of a lesser offense than the one charged. On 31 March 1958 sentence was pronounced. One year later, lacking 10 days, he protested in his petition for habeas corpus that he had not received the copy of the information to which he was entitled. These circumstances demonstrate that he waived any right he had to a copy of the information even if one was not given him.

After careful consideration we conclude that the writ should be discharged and the petitioner remanded to custody of the respondent.

TERRELL, HOBSON, THORNAL and O'CONNELL, JJ., concur.

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[fol. 69] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT
(Omitted in Printing)

[fol. 70] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No. 319, Misc.

ELIJAH McNEAL, JR., Petitioner,

vs.

R. O. CULVER, as State Prison Custodian

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —March 7, ~~1959~~ 1960

On petition for writ of Certiorari to the Supreme Court of the State of Florida.

On consideration of the motion for leave to proceed herein *in Forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted, and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 765.

March 7, 1960.

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PETITION NOT PRINTED

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

## No. 52

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ELIJAH McNEAL, JR.,

*Petitioner,*

*v.*

R. O. CULVER, as State Prison Custodian,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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## BRIEF FOR THE PETITIONER

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SAM DANIELS,
*1111 Brickell Avenue,*
*Miami, Florida,*
*Counsel for Petitioner.*

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

## No. 52

ELIJAH McNEAL, JR.,

*Petitioner,*

*v.*

R. O. CULVER, as State Prison Custodian,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

## BRIEF FOR THE PETITIONER

### Opinion Below

The opinion of the Supreme Court of Florida (R. 49-51) is reported at 113 So. 2d 381.

### Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). On July 1, 1959, the Florida Supreme Court rendered its final judgment rejecting petitioner's claim that he is imprisoned in violation of the due process clause of the Fourteenth Amendment (R. 49-51). Petitioner's motion for leave to proceed *in forma pauperis* and his petition for writ of certiorari were filed on September 14, 1959. This Court granted the motion and petition on March 7, 1960.

## Constitutional and Statutory Provisions Involved

The Constitutional and statutory provisions involved are set forth in the Appendix. This case involves Section 1, Fourteenth Amendment, Constitution of the United States and the following Florida Statutes:

2 Fla. Stat. 1957, p. 2797, Sec. 782.04 (MURDER)

2 Fla. Stat. 1957, p. 2798, Sec. 782.07 (MANSLAUGHTER)

2 Fla. Stat. 1957, p. 2800, Sec. 784.01 (MAYHEM)

2 Fla. Stat. 1957, p. 2800, Sec. 784.02 (PUNISHMENT OF ASSAULT)

2 Fla. Stat. 1957, p. 2800, Sec. 784.03 (PUNISHMENT OF ASSAULT AND BATTERY)

2 Fla. Stat. 1957, p. 2800, Sec. 784.04 (AGGRAVATED ASSAULT)

2 Fla. Stat. 1957, p. 2800, Sec. 784.05 (PUNISHMENT FOR CULPABLE NEGLIGENCE)

2 Fla. Stat. 1957, p. 2800, Sec. 784.06 (ASSAULT WITH INTENT TO COMMIT FELONY)

2 Fla. Stat. 1957, p. 2949, Sec. 917.01 (EXAMINATION OF DEFENDANT'S MENTAL CONDITION TO DETERMINE WHETHER HE SHALL BE TRIED)

2 Fla. Stat. 1957, p. 2957, Sec. 921.03 (JUDGMENT ON INFORMAL VERDICT)

## Question Presented

While petitioner was not represented by counsel, the State of Florida tried, convicted and imposed a twenty-year sentence on him for "Assault to Murder in the Second Degree." The Florida Supreme Court then held, in a habeas corpus proceeding, that petitioner need not and would not be afforded any hearing or other opportunity to prove that his conviction without counsel denied him due process. The record in the habeas corpus proceeding contained a controverted, but not disproven, allegation that the trial judge denied petitioner's request for counsel and told him he would not need a lawyer. The record also contained a partial transcript of the trial proceedings which was attached to the respondent's return. This transcript showed that:

1. When tried, petitioner was an ignorant, twenty-nine year old Negro. At age twenty-three he suffered head injuries which left him subject to black-out spells. At age twenty-eight he received six months' treatment for these injuries in a veterans' hospital, spending four months locked in a "psycho" ward. After his mother signed some type of guardianship papers, he was released from the hospital. He committed his alleged assault some 13 months later.
2. Petitioner's trial involved complicated substantive issues and difficult evidentiary problems; and
3. The prosecution, without interference from the trial judge, took unfair advantage of petitioner's inability to defend himself.

On these facts, did the Supreme Court of Florida deny petitioner due process when it denied him a hearing in the habeas corpus proceeding?

## Statement of the Case

Petitioner is presently serving a twenty-year sentence for "Assault to Murder in the Second Degree" (R. 22-23). He was found guilty of this supposed offense by a judge and jury in the Criminal Court of Record in and for Polk County, Florida (R. 22-23). His trial began and ended on the same day, February 26, 1958 (R. 22, 24). He was admittedly tried, convicted and sentenced while unrepresented by counsel.

The constitutional fairness of the state action which imprisons the unrepresented petitioner must be measured by the facts which follow. Most of these facts are shown by the trial transcript. A few are controverted allegations which must be considered true under this Court's decision in *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116.

### Petitioner's Background

Elijah McNeal, Jr., is a Negro (R. 2). He was twenty-nine years old (R. 41) when sentenced to twenty years at hard labor (R. 22-23). When tried, he neither knew nor understood court procedures; and did not "know how to defend himself and establish his innocence" (R. 2, 7, 9). He had never been in court before (R. 9, 2, 7).

McNeal's educational background is not disclosed by the record. However, the following language from his trial testimony sheds light on the extent of his formal education:

"... when I gets excited, I blacks out" (R. 38).

"I had it because I throwed it down myself" (R. 38).

"... they was not too bad" (R. 37).

"... without no shirt and no shoes" (R. 37).

"It's kept in a room with a twenty-two rifle I got to the house" (R. 39).

"I goes and I gets pills" (R. 42).

McNeal received head injuries in 1952, while in the Army (R. 42, 37). Since that time he has been subject to "blackout spells" when he gets excited or "over-headed" (R. 37-38). On April 8, 1956, he commenced six months' treatment for these injuries at the veterans' hospital in Bay Pines (R. 37, 42). The nature of this treatment is described in the record as follows:

> "When I was in the hospital, I stayed over there four months locked in the ward, psycho part of it; and the four months I was over there, I had to stay in there locked up all the time. Mama was the only one that could come and see me. And, well, about the latter part of the four months he give me a weekend pass. He was trying me to see if I would come back.
>
> And I went home and I come back on time. And I asked mama to come and sign for me as that was the only way I could get back. I had to have a guardian to sign. And she come over there that day and begged the doctor to let me go home" (R. 42-43).

McNeal's release from the "psycho" ward came some thirteen months before the alleged misdeeds for which he is presently confined (R. 37, 35). During this interval, he would return to the hospital and "get pills" (R. 42).

**Arrest and Arraignment**

McNeal was arrested within minutes after commission of his alleged offense (R. 30-31). Two of the state's four witnesses testified these events occurred on November 10,

1957 (R. 24, 35). The other two witnesses testified to a December 10, 1957 date (R. 29, 33). The date alleged in the information is not known since the state did not place a copy of the information in the record. The date McNeal was informed against is likewise unknown.

McNeal was arraigned sometime prior to January 20, 1958 (R. 23). At the arraignment, he admitted identity and pled not guilty to an information which apparently charged him with "Assault to Murder in the First Degree" (R. 23).

**Trial and Conviction**

McNeal's trial began and ended on February 26, 1958 (R. 22, 24). At the outset, the trial judge asked McNeal if he had a lawyer (R. 2). McNeal replied in the negative and requested the court to appoint someone to represent him (R. 2). The trial judge denied this request, saying:

1. "... since this is not a capital offense you are not entitled to a court appointed attorney" and
2. "... you won't need a Lawyer in this case. ... " (R. 2).

The state called four witnesses who produced twelve pages of testimony (R. 24-36). McNeal asked two questions and obtained two answers from the first witness, a Negro named Scurry (R. 28). McNeal's third "question" was precluded by the judge (although not objected to by the state) because "that is testifying, and it isn't time for you to testify" (R. 28). This "testimony" question was the last question McNeal asked at his trial. He asked no more questions of Scurry; and did not cross-examine the remaining three witnesses, Deputy Sheriff Neal (R. 36) and police officers Fields (R. 32) and Branch (R. 34).

When the state rested the following occurred in the jury's presence:

"Mr. Kelly: The State rests its case, Your Honor.

The Court: All right, now, Elijah, that is the State's case. If you want to, you can take the stand and tell your side of it. If you don't want to, you don't have to; because the burden is on the State to prove your guilt and not upon you to maintain your innocence. If you don't take the stand and testify, I will instruct the jury that they cannot consider that as any evidence of your guilt whatsoever. If you do take the stand and testify, then the State has a right to cross examine you. Do you want to tell your side of it?

Defendant: Yes, sir.

The Court: All right" (R. 36).

McNeal then took the stand. He gave a little over a page of direct testimony during which time the following incident took place:

"And it was the 8th of April, 1956, that I went over for treatment and stayed over there six months; and they sent me a paper that stated it was service connected and I could come to the hospital any time. And I lost that, and can I give you that one? (Handing paper to the Judge.) That paper is a statement from the doctor that examined me before I went to the hospital, and he give me that to bring over. It is a statement that I do have occasion to have blackout spells.

The Court: This statement would not be admissible. You could put the doctor on and have him testify; but we cannot admit any statement like this. We will allow you to testify about it. . . ." (R. 37)

When McNeal's cross-examination was over, the following occurred:

"The Court: Now, Lige, if you had an attorney, he would argue the case before the jury, what is called the opening argument and the closing argument. You can get up and talk to them first and then State will argue and then you will have the closing argument, if you wish to argue to them, plead your case.

Defendant: Well, sir, I don't quite understand the meaning of that.

The Court: Well, suppose you let the state make their argument and you listen now, pay close attention to what Mr. Kelly has to say for the State, and then you can get up here and answer him.

(Mr. Kelly argued on behalf of the State)

The Court: Now Lige, do you want to make any argument to them?

Defendant: No, sir" (R. 43).

The trial transcript ends with the above question. What, if anything the judge charged the jury is unknown. The judgment of conviction entered March 31, 1958, recites that the jury "rendered a verdict of guilty on February 26, 1958 to the offense of Assault to Murder in the Second Degree" (R. 22).

**Sentencing and Commitment**

As hereafter shown, the maximum possible sentence in Florida for any type of assault is twenty years at hard labor. On March 31, 1958, McNeal was sentenced to twenty years at hard labor (R. 22-23). He was sent to state prison in April of 1958 (R. 21-22).

**Habeas Proceedings Below**

On March 31, 1959, eleven months after his commitment, McNeal filed a petition for writ of habeas corpus in the

Supreme Court of Florida (R. 1). The crucial factual allegations of the petition are these:

> ". . . The petitioner is a Negro age 30 and never before appeared in any court on a felony, and did not understand court procedure or know how to defend himself and establish his innocence. At the commencement of trial Judge Roy H. Amidon, asked the petitioner if he had an attorney, petitioner answered no. And requested the court to appoint someone to represent him. The Court answered if the charge was a capital offence, I would appoint you an attorney, but since this is not a capital offence you are not entitled to a court appointed attorney and you won't need a Lawyer in this case, and then informed your petitioner he would be allowed to question the witnesses and also informed me I could take the witness stand in my behalf, but I would be questioned and crossed examined by the County Solicitor. Petitioner asked the Court if he could have a copy of the Information and a list of the State witnesses, the Court said that would not be necessary as the Information would be read to him, and that I would see all the witnesses when they took the stand. Thereupon, the State picked a Jury of six, and the County Solicitor, read the Information and the trial began. . . . " (R. 2)

The Florida Supreme Court issued the writ on April 7, 1959 (R. 15, 16). Respondent filed his return on April 16, 1959 (R. 16, 17-43). Four exhibits were attached to the return; the commitment to custody (R. 21-22), the judgment of conviction and sentence (R. 22-23), the minute book notation concerning arraignment (R. 23), and a partial transcript of the trial proceedings (R. 24-43).

The return denied that "the trial court refused to furnish petitioner a copy of the information . . . as no such

alleged refusal appears either in the court minutes reflecting the arraignment of petitioner nor in the trial record of this cause" as shown by the attached exhibits (R. 18). The return then went on to argue that petitioner waived his right "by his failing to make timely request for a copy of such charging document", and that the error, if any, was "absolutely harmless" (R. 18-19).

McNeal's allegations concerning his trial without counsel were "denied" by the following language in the return:

> "Respondent denies that petitioner's constitutional rights were violated by the court's alleged refusal to appoint counsel in his behalf.
>
> In this regard, the record reflects that no capital offense was involved; that the trial judge scrupulously protected the rights of the petitioner throughout the trial of this cause; that the petitioner effectively represented himself to the end that a verdict for a lesser offense was returned from that with which he was charged; and the law on this point being so well settled in Florida, it is considered unnecessary to discuss this question further" (R. 19-20).

**Supreme Court of Florida Opinion**

On July 1, 1959, the Florida Supreme Court discharged the writ and remanded petitioner to custody without affording him any hearing or other opportunity to prove the allegations of his petition. It reached the following conclusion regarding McNeal's right to counsel:

> "Nothing whatever appears in this record of the trial to show whether or not any request was made of the trial judge to appoint counsel to aid the petitioner in his defense. No obligation is put upon a trial judge by statute to appoint an attorney for an accused except in capital cases. Sec. 909.21, Florida Statutes 1955,

and F.S.A.; Johnson v. Mayo, 158 Fla. 264, 28 So. 2d 585, certiorari denied 329 U.S. 804, 67 S. Ct. 492, 91 L. Ed. 687; Johnson v. Mayo, Fla., 40 So. 2d 134, and no absolute responsibility rested on the judge trying the case to inquire about the wish of the defendant to have the services of legal counsel. Bute v. People of State of Illinois, 333 U.S. 640, 644, 68 S. Ct. 763, 92 L. Ed. 986, although we have recognized the practice of asking a defendant whether or not he desired a lawyer and of providing one if that was his wish. Sneed v. Mayo, Fla., 66 So. 2d 865.

Not only was there a lack of evidence in the record indicating that the petitioner was unable to defend himself but circumstances are reflected showing that we should indulge the presumption that the contrary was the case. The charge was simple and so was the evidence introduced to support it.

After the petitioner had an altercation with the proprietor in an establishment that appears to have been a 'jook', called the 'Blue Chip', he withdrew to his quarters, and, more effectively to renew the feud, reappeared armed with a shotgun loaded with fine shot. When he was within range of his late adversary he fired missing his target and wounding four other persons. His aim was wretched despite six years service in the army where, he says, he became a sharpshooter.

At the time of his trial he was 29 years of age.

So it cannot accurately be said that the issues were so complex, or the petitioner was so young, ignorant and inexperienced, as to bring into play the exception to the rule requiring appointment of counsel only in capital cases and to require further inquiry into the procedure culminating in his conviction and sentence. Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989, 89 L. Ed. 1367; Uveges v. Com. of Pennsylvania, 335 U.S. 437,

69 S. Ct. 184, 93 L. Ed. 127; Sneed v. Mayo, supra; Butler v. Culver, Fla., 111 So. 2d 35." *McNeal* v. *Culver* (Fla. 1959), 113 So. 2d 381 at 382.

## Summary of Argument

The state tried, convicted and imposed a twenty-year sentence on petitioner while he was not represented by counsel. Due process requires counsel for those accused of non-capital crimes whenever special circumstances make trial without counsel unfair. If, for any reason, an accused cannot effectively defend himself; due process puts a lawyer at his side.

The present record shows many special circumstances which made petitioner's trial without counsel unfair. When tried, petitioner was a twenty-nine year old Negro. He was ignorant, inexperienced and mentally ill. The charges he faced involved the interplay between the laws of assault, homicide, and intent. Evidence of his alleged admissions to his arresting officers was used to convict him although such evidence was clearly inadmissible and highly prejudicial. Insanity was a possible defense which passed unnoticed. Finally, the trial judge made no effort to guide petitioner past the errors which make trials without counsel unfair. Not once, during the entire trial, did he stop or even slow the prosecutor's presentation.

The prejudice of the procedure is proved by the punishment imposed. Petitioner received the maximum possible penalty for any type of assault. Yet, the verdict and judgment which confine him do not find him guilty of any known offense in the state's catalog of crimes.

It is not necessary to explore the outer limits of constitutional protection in this area. The state action which

imprisons petitioner is a monstrous affront to the fundamental dignities of mankind. Judged by any standard, it cannot stand.

## Argument

Elijah McNeal, Jr., has yet to receive a fair trial. The State action unleashed against this unrepresented man cannot be tolerated in a civilized society. The mere fact that the charges against him were non-capital cannot condone his conviction. Nine years ago this Court could state:

> "This Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in non-capital criminal cases where there are special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense. . . . " *Palmer* v. *Ashe*, 342 U.S. 134, 135.

The passage of time has not weakened this rule. Current confirmation is contained in *Cash* v. *Culver*:

> "In the 17 years that have passed since its decision in Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595, this Court, by a traditional process of inclusion and exclusion has, in a series of decisions, indicated the factors which may render state criminal proceedings without counsel so apt to result in injustice as to violate the Fourteenth Amendment. The alleged circumstances of the present case so clearly make it one where, under these decisions, federal organic law required the assistance of counsel that it is unnecessary here to explore the outer limits of constitutional protection in this area.
>
> 'Where the gravity of the crime and other factors—such as the age and education of the defendant, the

conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair,' the Constitution requires that the accused must have legal assistance at his trial. Uveges v. Commonwealth of Pennsylvania, 335 U.S. 437, 441, 69 S. Ct. 184, 186, 93 L. Ed. 127. Of particular relevance here are the decisions of the Court which have held the appointment of counsel necessary to a fair trial because of the complexity of the proceedings. Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989, 89 L. Ed. 1367; Gibbs v. Burke, 337 U.S. 773, 69 S. Ct. 1247, 93 L. Ed. 1686; and see Williams v. Kaiser, 323 U.S. 471, 475-476, 65 S. Ct. 363, 366, 89 L. Ed. 398. . . . " (358 U.S. 633, 636-637.)

The present record contains a complete inventory of the special circumstances which make trial without counsel unfair.

**1. Youth, Ignorance and Mental Illness**

When McNeal stood trial, he was a twenty-nine year old Negro, in court for the first time in his life (R. 2, 7, 9, 41). His claims that he neither knew nor understood court procedure and did not know how to defend himself (R. 2), are conclusively proved by the record. He proved himself incapable of questioning witnesses (R. 28, 32, 34, 36). He sat through the trial without objecting to a single occurrence (R. 24-43). He failed in his one attempt to get a document in evidence (R. 37). When the time for final argument arrived he could not "plead" his case because he did not "quite understand the meaning of that" (R. 43).

Addition of McNeal's mental illness to the picture makes his Florida trial a shocking and a shameful affair. In 1952

he suffered head injuries which left him subject to "black-out spells" (R. 37-38, 42). Four years later, the pathetic creature spends four months locked up in the "psycho" ward of a veterans' hospital (R. 42-43). Finally, he is signed out to the world at large with his mother as his guardian (R. 42-43). He then spends thirteen months taking some kind of pills before he commits his "crime."

McNeal's mentality and mental illness make him no match for the prosecution. Due process puts a lawyer at his side. E.g., *Cash* v. *Culver, supra; Massey* v. *Moore*, 348 U.S. 105; *Palmer* v. *Ashe, supra; Gibbs* v. *Burke*, 337 U.S. 773; *Uveges* v. *Pennsylvania*, 335 U.S. 437; *Townsend* v. *Burke*, 334 U.S. 736; and *Rice* v. *Olson*, 324 U.S. 786.

**2. Trial Complexities**

Mastery of the substantive issues in McNeal's case requires a synthesis of the Florida laws of assault, homicide and intent. Due process does not require a layman to enter this labyrinth without a lawyer. Cf. *Williams* v. *Kaiser*, 323 U.S. 471; *Tomkins* v. *State of Missouri*, 323 U.S. 485; and *Hawk* v. *Olson*, 326 U.S. 271. In the *Williams* case, this Court said:

> "... The law of Missouri has important distinctions between robbery in the first degree, robbery in the second degree, grand larceny, and petit larceny. These involve technical requirements of the indictment or information, the kind of evidence required for conviction, the instructions necessary to define the several elements of the crime, and the various defenses which are available. These are a closed book to the average layman. ..." 323 U.S. at 474-475.

Florida assault law is overrun with distinctions and degrees. Mayhem, bare assault, assault and battery, aggra-

vated assault, culpable negligence and assault with intent to commit felony are all statutory offenses.[1] Assault with intent to commit felony[2] incorporates by reference all Florida felonies and the degrees thereof.

The homicide statutes create four separate offenses—manslaughter,[3] and murder in the first, second and third degree.[4] In considering the interplay between homicide and assault with intent to commit felony, Florida has held that one can be guilty of assault with intent to commit manslaughter, *Lassiter* v. *State*, 98 Fla. 370, 123 So. 735. However, there is no such thing as assault with intent to commit murder in the third degree because this would be "an assault with intent to commit an act without intent". *Tillman* v. *State*, 81 Fla. 558, 88 So. 377, 380.

The requisite "intent" in this area, is stated as follows in *Williams* v. *State*, 41 Fla. 295, 26 So. 184, 185:

> ". . . All unlawful homicides in this state are either murder in the first, second, or third degrees, or manslaughter; but they are all felonies. If, therefore, one assaults another with intent to kill him, and the killing would be unlawful, he has committed an assault with intent to commit a felony, whether the homicide would, if it had been accomplished, have been murder in either degree, or merely manslaughter. The statute under consideration is clearly broad enough to include any felony, and manslaughter is a felony. But upon indictments for assault with intent to commit any of the grades or degrees of unlawful homicide, it will not be sufficient to show that the killing, had it occurred, would

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[1] 2 Fla. Stat. 1957, p. 2800, Secs. 784.01-784.06.

[2] 2 Fla. Stat. 1957, p. 2800, Sec. 784.06.

[3] 2 Fla. Stat. 1957, p. 2798, Sec. 782.07.

[4] 2 Fla. Stat. 1957, p. 2797, Sec. 782.04.

> have been unlawful, and a felony; but it must be found that the accused committed the assault with intent to take life, for, although an unintentional or involuntary killing may in some cases be unlawful, and a felony, no man can intentionally do an unintentional act; and without the intent the assault cannot be punished under this statute, even though the killing, had it been committed, would have amounted to a felony. . . . "

If McNeal fired his shotgun at Scurry, without this felonious "intent to kill", his greatest possible crime would have been aggravated assault—an assault "with a deadly weapon, without intent to kill."[5] This is not an academic distinction for fifteen years' difference in punishment is involved.[6]

INADMISSIBLE ADMISSIONS TO ARRESTING OFFICERS

The state's proof that McNeal "intended to kill Scurry" rested on McNeal's alleged admissions to his arresting officers (R. 31-33). Testimony concerning these alleged admissions was admitted without the slightest inquiry as to whether they were freely and voluntarily made (R. 31-34). This was a patent violation of Florida law. Admissions made to an officer while the accused is under arrest cannot be admitted unless the state *affirmatively* shows their free and voluntary nature. Violation of this rule produced both a reversal and the following statement of the law in *Louette v. State*, 152 Fla. 495, 12 So. 2d 168, 172-173:

> "But there are some jurisdictions which hold that a preliminary showing to the court that no force, threats or inducements were resorted to and that the statement was voluntary, is not necessary. See 22 C.J.S., Criminal

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[5] 2 Fla. Stat. 1957, p. 2800, Sec. 784.04.

[6] Five years is the maximum sentence for aggravated assault. A twenty year sentence can be imposed for assault with intent to commit felony. 2 Fla. Stat. 1957, p. 2800, Secs. 784.04, 784.06.

Law, §732, p. 1250 et seq. However, in the few cases in which this identical question has been discussed and decided in this jurisdiction, we have held that the voluntary character of the admission must be shown before it can be admitted in evidence. Thus in the case of Synes v. State, 78 Fla. 167, 82 So. 778, 780, this court said: 'The rule is settled in this state that where admissions of an incriminating fact are made by the accused to an officer while the accused is in custody charged with crime, such admissions or confessions, although extrajudicial, must appear to have been voluntarily made before admissible in evidence against him.'

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"In other words, the rule seems to be that an incriminating admission is admissible, whether made to a private citizen or to an officer, if it is affirmatively shown to have been free and voluntary, although in the latter case, when made to an officer while in custody, the question of voluntariness vel non should be more stringently examined into and slighter evidence of threats or inducements may suffice to exclude it.

Our conclusion therefore is that in this case the court erred in admitting the testimony of officer Fisher as to the highly incriminating admissions made by the defendants, while under arrest and in custody, without first inquiring into the circumstances under which they were made and determining the question as to whether or not they were freely and voluntarily made, uninfluenced by the use of any force, intimidation, coercion or threats, or the holding out of any inducements to them...."

The *Louette* case is still the law. ***Brown*** v. ***State*** (Fla. App. 1959), 111 So. 2d 296; ***Thomas*** v. ***State*** (Fla. 1957), 92 So. 2d 621; ***Williams*** v. ***State*** (Fla. 1954), 74 So. 2d 797.

The admissibility of an accused's admissions to arresting officers raises problems "beyond the ken of a layman" and admissions are "clearly the kind of testimony that could seriously damage a defendant in the eyes of a jury." *Cash* v. *Culver, supra,* 358 U.S. at 638.

POSSIBLE DEFENSES

Had McNeal been defended, insanity might have loomed large at his trial. Under Florida law:

> ". . . All men are presumed sane and when there is no evidence to the contrary a jury may act upon the presumption and determine guilt without concern for the sanity, or insanity, of a defendant. But when there is testimony of insanity sufficient to present a reasonable doubt of sanity the presumption vanishes. The defendant is then entitled to an acquittal if the state does not overcome the reasonable doubt." *Farrell* v. *State* (Fla. 1958), 101 So. 2d 130, 133.

The test of sanity is "whether or not defendant's alleged mental aberration was such as prevented him from distinguishing right from wrong". *Everett* v. *State* (Fla. 1957), 97 So. 2d 241, 245; *Piccott* v. *State* (Fla. 1959), 116 So. 2d 626. McNeal's head injuries, blackout spells, and recent confinement in a "psycho" ward (R. 37, 42-43) cast considerable doubt on his ability to pass this test.

CONVICTION FOR NON-EXISTENT CRIME

McNeal now serves twenty years for a non-existent crime —"Assault to Murder in the Second Degree." Both the verdict and the judgment of conviction use this exact language (R. 22-23). There has never been a finding that McNeal was guilty of "Assault *With Intent* to Murder in the Second Degree." Consequently, there has been no find-

ing that he was guilty of "Assault *With Intent* to Commit Felony" which is the statutory offense.[7]

> "The intent is the gist of the offense, and no one can be punished under this statute for an assault unless it be accompanied with the requisite intent." *Williams v. State*, 41 Fla. 295, 26 So. 184, 185.

Whether the verdict was legally sufficient to support the judgment of conviction is by no means clear. The Florida Supreme Court's *dicta* in *French* v. *State*, 96 Fla. 657, 118 So. 815, 815-816, strongly implies that it is not:

> "In a criminal prosecution the verdict should be responsive to the issues involved; and when the offense charged consists of distinct elements, as of an act committed with a specific intent, a verdict that is not general, as that the defendant is guilty as charged, but specifically finds the defendant guilty of the act, and does not mention the element of intent that is essential to a conviction for the offense charged, and does not make an equivalent finding, the verdict may be legally insufficient to sustain a judgment of conviction, and a judgment rendered thereon as for the offense charged may be reversed even though the legality of the verdict is not specifically challenged by motion in arrest of judgment or by motion for new trial. . . . "

Added support for this view is found in the Florida Statutes,[8] which provide:

> "JUDGMENT ON INFORMAL VERDICT.—If a verdict is rendered from which it can be clearly understood that it is the intention of the jurors to acquit the defendant, .

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[7] 2 Fla. Stat. 1957, p. 2800, Sec. 784.06.

[8] 2 Fla. Stat. 1957, p. 2957, Sec. 921.03.

judgment of not guilty shall be rendered thereon even though the verdict is defective; but, *no judgment of guilty shall be rendered on a verdict unless the jurors clearly express in it a finding against the defendant upon the issue.*"

McNeal's conviction for a non-existent crime casts considerable doubt on the assertion below that "it cannot accurately be said that the issues were so complex". *McNeal* v. *Culver*, 113 So. 2d at 382.

### 3. Unrepresented by Counsel, Unprotected by the Court

The record shows a complete lack of concern for Elijah McNeal, Jr., until prison plagiarists[9] filed his potent petition below. The trial judge made little or no effort to guide the unrepresented defendant "past the errors that make trials unfair." *Gibbs* v. *Burke*, 337 U.S. 773, 781.

The record indicts the trial judge. Faced by an ignorant Negro charged with a grave felony, he failed to furnish counsel assuring him "you won't need a Lawyer in this case" (R. 2). When evidence of McNeal's mental illness came before him, he did nothing. Yet, Florida law[10] provides:

"917.01 EXAMINATION OF DEFENDANT'S MENTAL CONDITION TO DETERMINE WHETHER HE SHALL BE TRIED.—(1) If before or during trial the court, of its own motion, or upon motion of counsel for the defendant, has

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[9] McNeal's petition and the Brief for Petitioner in *Cash* v. *Culver*, *supra*, contain paragraphs of identical language. E.g., R. 8-9 of this case and pages 8-9 of Cash's brief before this Court. Cash and McNeal are fellow inmates at Raiford. Cash's brief was written by court-appointed counsel, Irwin L. Langbein, Esq., of West Palm Beach, Florida.

[10] 2 Fla. Stat. 1957, p. 2949, Sec. 917.01(1).

> reasonable ground to believe that the defendant is insane, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant and to testify at the hearing as to his mental condition. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party."

The law of evidence was used by the judge to block McNeal's "testifying" question (R. 28) and his feeble attempt to get a document in evidence (R. 37). Objection by the state was unnecessary. Yet, the same judge sat idly by while the state proved its case with a barrage of leading questions and unresponsive answers (R. 24-36). The accused's alleged admissions to his arrestors came in without any proof of their free and voluntary nature. Yet, such a showing is so vital that the Florida Supreme Court held in *Stiner* v. *State*, 78 Fla. 647, 83 So. 565, 566:

> "While we think it is best for counsel to interpose objections to the introduction of evidence of admissions or confessions, in order that the court may make the preliminary investigation to determine its admissibility, that does not relieve the trial judge of the duty when evidence of this character is sought to be introduced to satisfy himself that the admissions were freely and voluntarily made before admitting them. *It is a duty which the law imposes upon the court in order that the prisoner's constitutional right to a fair and impartial trial may be protected and preserved,* and this right should not be made to depend on the skill and alertness of counsel, otherwise courts, instead of being the forum in which justice alone is the object to be attained, would become games played by the respective

counsel and won or lost according to their skill in playing the game according to the rules. . . . "

The record does not reflect a single incident where the judge impeded the prosecutor's presentation.

## CONCLUSION

As in Cash's case, "it is unnecessary here to explore the outer limits of constitutional protection in this area." *Cash* v. *Culver, supra,* 358 U.S. at 637. Florida's trial of this ignorant, unbalanced and unrepresented Negro is a monstrous affront to the fundamental dignities of mankind. It cannot stand.

Respectfully submitted,

SAM DANIELS,
*1111 Brickell Avenue,*
*Miami, Florida,*
*Counsel for Petitioner.*

# APPENDIX

## Constitutional and Statutory Provisions Involved

*United States Constitution, Amendment XIV*

§1

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

FLORIDA STATUTES IN EFFECT IN 1957

*Sec. 782.04* (2 Fla. Stat. 1957, p. 2797, Sec. 782.04)

MURDER:—The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnaping, shall be murder in the first degree, and shall be punishable by death.

When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree, and shall be punished by imprisonment in the state prison for life, or for any number of years not less than twenty years.

When perpetrated without any design to effect death, by a person engaged in the commission of any felony, other than arson, rape, robbery, burglary, the abominable and detestable crime against nature, or kidnaping, it shall be murder in the third degree, and shall be punished by imprisonment in the state prison not exceeding twenty years.

*Sec. 782.07* (2 Fla. Stat. 1957, p. 2798, Sec. 782.07)

MANSLAUGHTER.—The killing of a human being by the act, procurement or culpable negligence of another,

in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter, and shall be punished by imprisonment in the state prison not exceeding twenty years, or imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars.

*Sec. 784.01* (2 Fla. Stat. 1957, p. 2800, Sec. 784.01)

MAYHEM:—Whoever, with malicious intent to maim or disfigure, cuts or maims the tongue, puts out or destroys an eye, cuts or tears off an ear, cuts, slits or mutilates the nose or lip, or cuts off or disables a limb or member of any other person, and whoever is privy to such intent, or present, aiding or abetting in the commission of such offense, shall be punished by imprisonment in the state prison not exceeding twenty years or by fine not exceeding five thousand dollars.

*Sec. 784.02* (2 Fla. Stat. 1957, p. 2800, Sec. 784.02)

PUNISHMENT OF ASSAULT.—Whoever commits a bare assault shall be punished by a fine not exceeding one hundred dollars.

*Sec. 784.03* (2 Fla. Stat. 1957, p. 2800, Sec. 784.03)

PUNISHMENT OF ASSAULT AND BATTERY.—Whoever commits assault and battery shall be punished by imprisonment not exceeding six months, or by fine not exceeding five hundred dollars.

*Sec. 784.04* (2 Fla. Stat. 1957, p. 2800, Sec. 784.04)

AGGRAVATED ASSAULT.—Whoever assaults another with a deadly weapon, without intent to kill, shall be guilty of an aggravated assault, and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding three thousand dollars, or by both such fine and imprisonment.

*Sec. 784.05* (2 Fla. Stat. 1957, p. 2800, Sec. 784.05)

PUNISHMENT FOR CULPABLE NEGLIGENCE.—Whoever through culpable negligence, or a reckless disregard for the safety of others, inflicts any personal injury or injuries upon another, not resulting in death, shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding one thousand dollars.

*Sec. 784.06* (2 Fla. Stat. 1957, p. 2800, Sec. 784.06)

ASSAULT WITH INTENT TO COMMIT FELONY.—Whoever commits an assault on another, with intent to commit any felony punishable with death or imprisonment for life, shall be punished by imprisonment in the state prison not exceeding twenty years. An assault with intent to commit any other felony shall be punished to an extent not exceeding one-half the punishment which could have been inflicted had the crime been committed.

*Sec. 917.01* (2 Fla. Stat. 1957, p. 2949, Sec. 917.01)

EXAMINATION OF DEFENDANT'S MENTAL CONDITION TO DETERMINE WHETHER HE SHALL BE TRIED. . . . (1) If before or during trial the court, of its own motion, or upon motion of counsel for the defendant, has reasonable ground to believe that the defendant is insane, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant and to testify at the hearing as to his mental condition. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

(2) If the court, after the hearing, decides that the defendant is sane, it shall proceed with the trial. If, however, it decides that the defendant is insane, it shall take proper steps to have the defendant committed to the proper institution. If the defendant is declared insane during the trial, and afterwards released

from the institution to which he has been committed, as sane, his former uncompleted trial shall not constitute former jeopardy. If, after a defendant has been committed to an institution as insane, the proper officer of such institution is of the opinion that the defendant is sane, he shall report this fact to the court which conducted the hearing. If the officer so reports, the court shall fix a time for a hearing to determine whether the defendant is sane. This hearing shall be conducted in all respects like the original hearing to determine the defendant's sanity. If found sane, the trial shall proceed; if found insane, he shall again be recommitted as hereinabove set forth. No defendant committed by a court to an institution, by reason of the examination referred to in this paragraph, shall be released therefrom, without the consent of the court committing him.

*Sec. 921.03* (2 Fla. Stat. 1957, p. 2957, Sec. 921.03)

JUDGMENT ON INFORMAL VERDICT.—If a verdict is rendered from which it can be clearly understood that it is the intention of the jurors to acquit the defendant, judgment of not guilty shall be rendered thereon even though the verdict is defective; but no judgment of guilty shall be rendered on a verdict unless the jurors clearly express in it a finding against the defendant upon the issue.

[redacted] FILE COPY

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JAMES R. BROWNING, Clerk

PETITION NOT PRINTED

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 52

ELIJAH McNEAL, JR.,
*Petitioner,*

vs.

R. O. CULVER, as State Prison Custodian,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

## BRIEF FOR THE RESPONDENT

RICHARD W. ERVIN
Attorney General

ODIS M. HENDERSON
Assistant Attorney General
Counsel for Respondent

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## BRIEF FOR THE RESPONDENT

## PRELIMINARY STATEMENT

This cause was presented to the Supreme Court of Florida in an original habeas corpus proceeding on the basis of two definite issues of law; to-wit:

(1) Whether or not the trial court violated the petitioner's Constitutional rights, both State and Federal, in denying the petitioner the organic

Constitutional right to be furnished a copy of the Information entered against him.

(2) Whether or not the trial court violated the petitioner's Constitutional rights, both State and Federal, by denying him the right to representation by court appointed counsel as required by decisional rules and established law, as laid down by the Florida Supreme Court, and as held by the United States Supreme Court.

The first question, supra, was vigorously emphasized by petitioner in his initial petition, and staunchly supported in his reply brief to our original response. Since the question presented therein had never been directly passed upon by a Florida Appellate Court, and since your respondent reasonably interpreted said question to be the true foundation stone upon which the petitioner sought relief, it is herein conceded that the State's original response was primarily dedicated to said question. Our State Supreme Court disposed of this question upon the basis of evident waiver on the part of petitioner, as contemplated by *Howard v. State,* 146 Ala. 149, 41 So. 301 (Tr. 50-51).

In the instant proceedings, on certiorari, however, the petitioner has abandoned the first point presented in his original petition, and relies solely upon the second question, relative to his alleged right to counsel during his original trial. We shall endeavor to restrict our response accordingly.

## QUESTION PRESENTED

(as rephrased)

WHETHER OR NOT THE PETITIONER WAS DENIED THE RIGHT TO COURT APPOINTED COUNSEL, AND IF SO, DID SUCH DENIAL CONSTITUTE A VIOLATION OF HIS CONSTITUTIONAL RIGHTS, BOTH STATE AND FEDERAL.

## ARGUMENT

On February 24, 1959, this Court reversed the Florida Supreme Court's ruling previously filed in the case of *Cash v. Culver*, 358 U.S. 633, 3 L.Ed. 2d 557, 79 S.Ct. 432. The writ of habeas corpus in the instant case was issued by the Florida Supreme Court on April 17, 1959 (Tr. 15). Petitioner's reply brief was filed on May 23, 1959, in which he specifically relied upon *Cash v. Culver*, supra, for further consideration in the premises (Tr. 44, 46, 47). The opinion of the Florida Supreme Court in this cause was thereafter filed on July 1, 1959 (Tr. 49). It can therefore be assumed with confidence that the Florida Supreme Court arrived at its ultimate decision herein with this Court's tones of reversal ringing clearly in their judicial ears, and with the full knowledge that your mandate in *Cash*, supra, must be adopted and followed in like circumstances.

Thus, it is deemed necessary that the material elements in the instant case be measured by the exacting rule laid down in the Cash case.

## McNEAL AND CASH COMPARED

All references to Cash herein are taken from *Cash v. Culver*, 3 L.Ed. 2d at pages 558-561. References to *McNeal* are taken from the transcript of record filed in these present proceedings, at the page indicated.

### A. COMPARISON OF RECORDS BEFORE COURT

The record in Cash (before this Court) consisted only of the habeas corpus petition and the Florida Supreme Court's bare order of denial. Thus, all allegations of the petition were treated as true. *Hawk v. Olson*, 326 U.S. 271, 90 L.Ed. 61, 66 S.Ct. 116.

The record in McNeal, now before this Court, consists of the petition, response, reply brief, testimony produced at the original trial, certain pertinent parts of the trial record, opinion of the Florida Supreme Court, and petitioner's brief on certiorari.

### B. COMPARISON OF AGES, EDUCATION AND EXPERIENCE

Cash was "an uneducated farm boy of 20", when his original trial began. (Burglary)

McNeal was a 29-year-old Negro man, a veteran of almost six years in the army; (Tr. 37) a G.I. student and employee at a nursery (Tr. 42-43).

## C. COMPARISON OF INDICATIONS OF DOUBT

Cash was represented by able counsel of his own choice at his first trial, and the jury failed to convict, thus establishing a tangible practical indication of the difference a lawyer's help at the second trial might have been. He was not represented by counsel at his second trial, which resulted in a conviction.

McNeal's record discloses no such indication of his probable innocence.

## D. OPPORTUNITY TO OBTAIN COUNSEL

Cash was placed in solitary confinement in the State Prison after his first trial, and had no opportunity to employ counsel to represent him at his second trial.

McNeal was arrested on the night of his offense, November 10, 1957 (Tr. 33). He was arraigned and plead not guilty. Thereafter, on February 26, 1958, he was convicted, and on March 31, 1958, he was sentenced (Tr. 22-23). Thus, McNeal had from November 10, 1957, until February 26, 1958, in which to secure counsel of his own choice. Petitioner does not allege, nor does the record reflect that he was in jail during this interval of more than three months, or that he was otherwise unable to secure the services of an attorney during such interval. On the contrary, the record indicates that petitioner was at liberty during such time, viz:

Q. *Do* you draw an army pension or something?

A. I *draw* compensation for the school, but the pension *was* cut off. (Tr. 42)

* * *

Q. What kind of work *do* you *do*?

A. *I work* at the nursery, Lake Garfield. (Tr. 43)

Thus the present tense utilization of petitioner's answers given to questions propounded during his trial indicates that he attended classes and worked at the nursery right up to the trial date.

## E. COMPARATIVE ATTEMPTS TO OBTAIN COUNSEL

At the opening of Cash's second trial he informed the trial judge (his first opportunity) of his original lawyer's sudden withdrawal, and of his own youth and lack of education and courtroom experience, and asked the court for a *continuance* to give him time to *employ* a new lawyer, or in the *alternative* that the court appoint counsel for him.

McNeal's record fails to reflect or allege that he ever attempted to consult an attorney of his own choice, or that he was denied such opportunity. On the contrary, the record shows that his father and mother and a "big family" were living in Polk County, Florida, during these entire proceedings, with the single exception of his father's death in December, 1957 (Tr. 39, 40, 41). Thus, it is apparent that he had ample opportunity to consult counsel, either directly or through his family.

Further, McNeal's record fails to substantiate, either directly or indirectly, that he was denied counsel of his own choice *or* that he ever requested court appointed counsel and was denied same.

## F. COMPARATIVE COMPLEXITIES OF OFFENSES CHARGED.

Cash was charged with burglary. McNeal was charged with assault with intent to commit murder in the first degree. Neither offense is prima facie "complex" but might become so in light of testimony proffered to substantiate same, as is usually the case in a burglary prosecution. The offense of burglary is one usually perpetrated in an atmosphere of stealth, under cover of darkness, or in other circumstances wherein eye witness detection is unlikely. The offense is seldom discovered until the burglars have had ample opportunity to flee the premises and safely stash or otherwise dispose of the proceeds of their ill-gotten gains. Thus, the detection and prosecution of such offenders nearly always involves evidence of a technical nature, including fingerprints, plaster foot or tire casts, complex inventories of the place burglarized . . . and other evidence which necessarily demands a knowledge of the laws of circumstantial evidence on the part of state and defense alike in any prosecution thereon. And finally, as in the Cash case, the state is rarely able to secure a conviction without the testimony of an accomplice, thus bringing into play the law relative to the testimony of an accomplice, as noted by this Court in Cash, supra.

Comparatively speaking, the offense of assault with intent to commit first degree murder is one that would not reasonably put a trial judge on prior notice that the issues involved would be complex. The very nature of this offense involves intent to do violent harm to the person of another, as opposed to their property, and as such, in almost every case there is one or more eye witnesses to the act, as indeed in the case at bar there were several. The usual defenses available are self-defense, accident, misfortune, or lack of intent. The only defense offered by McNeal was "lack of intent to kill," as reflected by his own testimony:

> "But I ask the mercy of the Court. I didn't at any time intend to kill anybody . . . I was in the army for almost six years, and I made expert with just about every weapon I fired, even a shotgun; and if I'd intended to kill a man, then I believe I would have killed him. I was *trying to scare them* and stop them from jumping on people." (Tr. 37-38)

Thus, it is evident that the jury gave McNeal the benefit of every doubt by removing from consideration the charge of assault with intent to commit murder in the first degree, and rendering its verdict on the lesser degree of assault with intent to commit murder in the second degree.

Murder in the second degree is defined in Section 782.04 Florida Statutes, as:

> The unlawful killing of a human being . . . when perpetrated by an act imminently dangerous to another, and evincing a depraved mind regardless of

human life, although without any premeditated design to effect the death of any particular individual.

The facts here clearly demonstrate that McNeal withdrew from a short-lived fist fight at the "Blue Chip" Tavern, went to his home, armed himself with a loaded shotgun, returned to the "Blue Chip" and fired point blank into a group of people, wounding some, but missing his intended victim.

Surely, such *uncontradicted* testimony speaks more clearly and loudly than any argument relative to the establishment of the necessary elements of the offense committed.

Thus, it is evident that the petitioner did utilize the only defense available to him, and further, that he was successful in this endeavor.

Your respondent therefore respectfully submits that the petitioner herein has been afforded every protection guaranteed to him under the Constitution of the United States and of Florida, as well as those specific guarantees contemplated by this Court in *Cash v. Culver*, supra; *Betts v. Brady*, 316 U.S. 455, 86 L.Ed. 1595, 62 S.Ct. 1252; *Uveges v. Pennsylvania*, 355 U.S. 437, 93 L.Ed. 127, 69 S.Ct. 184; *Rice v. Olson*, 324 U.S. 786, 89 L.Ed. 1367, 65 S.Ct. 989, and related cases, as well as those principles pronounced by the Supreme Court of Florida in *Sneed v. Mayo*, 66 So. 2d 865; *Myers v. State*, 94 So. 507 and *Johnson v. Mayo*, 28 So. 2d 585.

Your respondent recognizes the remaining issues contained in petitioner's brief relative to the conduct of the trial below, but submits, first, that these matters were not before the Florida Supreme Court in the original habeas corpus proceedings, and second, that such complaints here now registered for the first time, i.e.: alleged misconduct of trial judge and prosecutor, improper predicate to incriminating admissions, etc., are all proper matters for review on *appeal*, and are not proper subjects for consideration in habeas corpus proceedings.

> "The great writ of habeas corpus is a writ of right obtainable under our Constitution by all men who claim to be unlawfully imprisoned against their will. It is designed to test *solely* the legality of the petitioner's imprisonment, and *may not be used* as a substitute *for appeal.*" (Emphasis supplied) *Ex Parte Armos*, 93 Fla. 5, 112 So. 289; *Collingsworth v. Mayo*, Fla., 37 So. 2d 696.

The real issue herein, in its final analysis, boils down to an unsupported allegation that petitioner was arbitrarily denied court appointed counsel. In this regard such duty as may rest upon the Florida courts to furnish counsel in criminal cases less than capital arises by virtue of the Fourteenth Amendment to the United States Constitution, and it imposes no absolute requirement that counsel be furnished unless the accused is incapable of representing himself adequately at the trial on account of age, ignorance or lack of mental capacity. Whether any such incapacity exists is purely personal and is a factual issue which can be determined only by an examination and observation of the individual in question.

Where a trier of the facts has made a finding on the issue his finding will not be disturbed if supported by competent credible evidence.

By petitioner's own admission, whether true or fanciful, the trial judge below made a finding on such issue when he allegedly remarked: ". . . and you won't need a lawyer in this case . . ." (Tr. 2).

Petitioner has chosen to remark on page 21 of his brief: "The record shows a complete lack of concern for Elijah McNeal, Jr., until prison plagiarists filed his potent petition below."

In explanation of the source of McNeal's legal advice, he points out the *identical language* utilized in portions of McNeal's petition and the original petition of Cash, supra.

It should be noted that McNeal did not file his original petition herein until March 21, 1959, almost a month after this Court ruled favorably on Cash's petition, on February 24, 1959.

Thus, petitioner's remark, above quoted, should be more appropriately paraphrased to read:

"The record shows a complete lack of concern *on the part of Elijah McNeal* for his own circumstances, or for the circumstances surrounding his trial, *until* a prison plagiarist succeeded in his own behalf in reaching the ear of this court, whereupon petitioner promptly appropriated the tools of Cash to repair the suddenly imagined discrepancies in his own conviction."

The following quotation by Mr. Justice Sebring, of the Florida Supreme Court, as voiced in *Sneed v. Mayo*, supra, is deemed to be most applicable to this entire cause:

> "The increase in this type of litigation in the federal courts would suggest either an appalling abuse of constitutional rights in state criminal trials or a scandalous abuse of the privilege of the writ of habeas corpus. Manifestly, the latter is the situation. It is apparent from the decisions that the federal courts, out of a proper regard for the rights of the very few persons who have been convicted in state court trials in violation of constitutional rights, have permitted themselves to be burdened by thousands of groundless, if not fraudulent, claims, many of which have been conjured up by prisoners after years of imprisonment, and after witnesses who might have been in a position to refute such claims are no longer available."

In final support of respondent's argument herein, the sound and well written opinion of Mr. Chief Justice Thomas, rendered in this cause, reported in *McNeal v. Culver*, 113 So. 2d 381, and included in the record herein, transcript 49, is hereby adopted by reference, and made a part of the respondent's brief.

## CONCLUSION

Your respondent respectfully submits, that upon the foregoing authorities cited and argument presented, the writ of certiorari heretofore issued in this cause should be quashed, and/or that the order of the Florida Supreme Court heretofore entered herein, be affirmed.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

ODIS M. HENDERSON
Assistant Attorney General
Counsel for Respondent

## CERTIFICATE OF SERVICE

I hereby certify that I have on this date furnished a true and correct copy of the foregoing Brief to counsel for the petitioner, by depositing same in a United States Mail Box with first class postage prepaid, addressed to Sam Daniels, Esq., Attorney for the Petitioner, at his post office address at 1111 Brickell Avenue, Miami, Florida.

This _____ day of October, A.D. 1960.

_____

Of Counsel for Respondent

# SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1960

Elijah McNeal, Jr., Petitioner,
v.
R. O. Culver, as State Prison Custodian.

On Writ of Certiorari to the Supreme Court of the State of Florida.

[January 23, 1961.]

Mr. Justice Whittaker delivered the opinion of the Court.

Upon an information charging "Assault to Murder in the First Degree," petitioner was put to trial, without counsel, before a jury in a Florida court, was convicted of "Assault to Murder in the Second Degree" and sentenced to imprisonment for a term of 20 years which he is now serving. No appeal was taken, but within a year from his conviction petitioner filed a petition for a writ of habeas corpus in the Supreme Court of Florida.

In that rather inartfully drawn petition, prepared in the penitentiary, at least the following allegations were made with reasonable clarity: When brought before the court for trial, petitioner, an indigent, ignorant and mentally ill Negro then 29 years of age, advised the court that he was without, and unable to obtain, counsel to conduct his defense and asked that counsel be appointed to represent him. The judge declined to do so, saying (1) "[S]ince this is not a capital offense you are not entitled to a court appointed attorney," and (2) "you won't need a lawyer in this case." Immediately, a jury was impaneled, the trial began, and petitioner was left to conduct his own defense. But, having "never before appeared in any court on a felony, and not understand[ing] court procedure or know[ing] how to defend himself," petitioner was unable effectively to conduct and present his defense, and, in consequence, the court's

denial of his request for counsel deprived him of due process of law guaranteed by both the Florida and the United States Constitutions.

The Florida Supreme Court issued a provisional writ of habeas corpus directing respondent to make a proper return. Respondent's return denied that "petitioner's constitutional rights were violated by the court's alleged refusal to appoint counsel in his behalf," attached a copy of (1) a partial transcript of proceedings at the trial, (2) the judgment of conviction and sentence and (3) the commitment, and asserted that petitioner was being lawfully imprisoned under the latter document. Finding nothing "in this record of the trial to show whether or not any request was made of the trial judge to appoint counsel to aid petitioner in his defense," and believing "that the issues were [not] so complex, or the petitioner so young, ignorant and inexperienced, as to bring into play the exception to the rule requiring appointment of counsel only in capital cases and to require further inquiry into the procedures culminating in his conviction and sentence," the Florida Supreme Court, without any hearing upon petitioner's allegations, discharged the writ and remanded petitioner to custody. 131 So. 2d 381. We granted certiorari to determine whether the allegations in the habeas corpus petition, as supplemented by other portions of the record, are such as entitled him to a full hearing thereon, and, if so and if those allegations be found true, whether petitioner was denied due process of law guaranteed by the Fourteenth Amendment of the United States Constitution. 362 U. S. 910.

It is thoroughly settled that:

> "'Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal pro-

ceedings without counsel so apt to result in injustice as to be fundamentally unfair,' the Constitution requires that the accused must have legal assistance at his trial." *Cash* v. *Culver*, 358 U. S. 633, 637, and cases cited.[1]

The record shows that petitioner was involved in a minor altercation with the proprietors—two men named Scurry—of what is referred to as a "jook," called the "Blue Chip," located in the "colored quarters" of Lake Wales, Florida, during the evening of December 10, 1957, and was ordered to leave the place, which he did. Soon afterward, petitioner, "without shirt or shoes" and armed with a shotgun, approached the "Blue Chip" and, although a number of persons, including one of the Scurrys, were standing on the sidewalk, petitioner fired the gun in their direction and some of the pellets struck the lower legs of four persons, but Scurry was not hit. City police officers immediately arrested petitioner. They stated that, in the course of transporting him to jail, petitioner said that "he was sorry he shot these other boys, he intended to kill Scurry." On this premise, petitioner was charged with and tried for "Assault to Murder in the First Degree."

Although the record does not disclose the extent of petitioner's education, there is abundant evidence that it was slight.[2] Moreover, the record shows that he suffered head injuries in the Army in 1952, and ever since has been subject to "blackout spells" when excited. For a period of months following April 8, 1956, he underwent treat-

[1] Such is the rule, in those circumstances, whether or not the accused requested the appointment of counsel. *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441.

[2] The following statements, made by petitioner at his trial, are clear evidence of his lack of education: "when I gets excited, I blacks out"; "I had it because I throwed it down myself"; ". . . without no shirt and no shoes"; "I goes and gets pills."

ment for his mental condition in the Veterans Hospital at Bay Pines, Florida, and during four months of that period he was detained in the psychopathic ward. In October 1956, he was released, apparently to his mother as his guardian,[3] but he continued to return to the hospital to "get pills."

The record shows that petitioner was incapable of questioning witnesses and otherwise unable to conduct his defense. The State produced four witnesses—the complaining witness, Ellix Scurry, and three police officers. Petitioner asked two questions of the witness Scurry and obtained answers thereto. His third "question" was precluded by the judge, although not objected to by the State, because "that is testifying and it isn't time for you to testify." Petitioner asked no further questions of Scurry, did not cross-examine the other three witnesses, nor did he make a single objection during the trial. When the State rested, the judge said to petitioner: "All right, now, Elijah, that is the State's case. If you want to, you can take the stand and tell your side of it. If you don't want to, you don't have to . . . ." Petitioner then took the stand and, after mentioning his head injury, "blackout spells" and hospital treatment for his mental illness, testified that he must have suffered a "blackout spell" preceding and during the shooting incident as "that part is a complete blank," but that he is sure he did not "intend

[3] On this score petitioner testified:

"When I was in the hospital, I stayed over there four months locked in the ward, psycho part of it; and the four months I was over there, I had to stay in there locked up all the time. Mama was the only one that could come and see me. And, well, about the latter part of the four months he give me a weekend pass. He was trying me to see if I would come back.

"And I went home and I come back on time. And I asked mama to come and sign for me as that was the only way I could get back. I had to have a guardian to sign. And she come over there that day and begged the doctor to let me go home."

to kill anybody." He then attempted to put in evidence a doctor's statement which he said verified his claim of suffering "blackout spells." Although the State did not object, the judge said "This statement would not be admissible. You could put the doctor on and have him testify; we cannot admit any statement like this," and the statement was not received in evidence. At the conclusion of petitioner's testimony, the judge said to petitioner: "Now, Lige, if you had an attorney, he would argue the case before the jury" and advised petitioner that, if he desired, he could "plead [his] case." Petitioner replied: "Well, sir, I don't quite understand the meaning of that," and he did not make any argument to the jury.

These facts tend strongly to show that petitioner's ignorance, coupled with his mental illness and complete unfamiliarity with the law and court procedures, and the scant, if any, help he received from the court, made the trial fundamentally unfair.

In addition to this showing of petitioner's lack of education and mental illness and his consequent inability to defend himself, the record at least implicitly discloses a number of highly complex legal questions, beyond the comprehension of almost any layman.

The Florida assault law appears to be replete with distinctions and degrees. Mayhem, bare assault, assault and battery, aggravated assault and assault *with intent* to commit felony are all statutory offenses.[4] Assault *with intent* to commit felony—apparently the crime intended to be charged against petitioner—incorporates by reference all Florida felonies and the degrees thereof.[5] The

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[4] 2 Fla. Stat. 1957, p. 2800, §§ 784.01–784.06.

[5] 2 Fla. Stat. 1957, p. 2800, § 784.06, which provides:

"ASSAULT WITH INTENT TO COMMIT FELONY.—Whoever commits an assault on another, with intent to commit any felony punishable with death or imprisonment for life, shall be punished

Florida homicide statutes appear to create four separate offenses—manslaughter,[6] and murder in the first, second and third degrees.[7] In considering the interplay between homicide and assault with intent to commit felony, the Florida courts have held that, although one may be guilty of assault with intent to commit manslaughter, *Lassiter* v. *State*, 98 Fla. 370, 123 So. 735, there is no such thing as assault with intent to commit murder in the second or third degrees because—inasmuch as those crimes do not require a finding of "intent"—such would be "an assault with intent to commit an act without intent." *Tillman* v. *State*, 81 Fla. 558, 88 So. 377, 380.

To establish the requisite "intent" to commit any of the grades or degrees of unlawful homicide "it will not be sufficient to show that the killing, had it occurred, would have been unlawful, and a felony; but it must be found that the accused committed the assault with intent to take life, for, although an unintentional or involuntary killing may in some cases be unlawful, and a felony, no man can intentionally do an unintentional act; and without the intent the assault cannot be punished under this statute, even though the killing, had it been committed, would have amounted to a felony. . . ." *Williams* v. *State*, 41 Fla. 295, 26 So. 184, 185.

If, in firing the gun, petitioner did not have this felonious "intent to kill," his greatest possible crime would have been "Aggravated Assault"—an assault "with a deadly weapon, without intent to kill."[8] This is not an academic distinction, for 15 years' difference in punish-

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by imprisonment in the state prison not exceeding twenty years. An assault with intent to commit any other felony shall be punished to an extent not exceeding one-half the punishment which could have been inflicted had the crime been committed."

[6] 2 Fla. Stat. 1957, p. 2798, § 782.07.

[7] 2 Fla. Stat. 1957, p. 2797, § 782.04.

[8] 2 Fla. Stat. 1957, p. 2800, § 784.04.

ment is involved.* The only testimony in this record of "intent to kill" was that of the police officers who testified that while transporting him to jail on the night of the occurrence, petitioner stated that he "intended to kill Scurry." That testimony appears to have been admitted without the slightest inquiry as to whether the statement was freely and voluntarily made by petitioner. Admission of that crucial evidence, in those circumstances, shows a patent violation of the Florida law which renders inadmissible all admissions made to law officers by an accused while under arrest unless the State *affirmatively shows* that they were freely and voluntarily made. *Louette* v. *State*, 152 Fla. 495, 12 So. 2d 168; *Thomas* v. *State* (Fla. 1957), 92 So. 2d 621; *Williams* v. *State* (Fla. 1954), 74 So. 2d 797. These complex and intricate legal questions were obviously "beyond the ken of a layman." *Cash* v. *Culver, supra*, at 638.

Indeed, it is questionable whether such a crime as the one upon which petitioner was charged, tried and convicted—"Assault to Murder," not "Assault *with Intent* to Commit Felony"—actually exists under the Florida law, *Williams* v. *State, supra*, and it is equally uncertain whether the verdict, convicting petitioner of "Assault to Murder in the Second Degree," is sufficient to support the judgment in the light of 2 Fla. Stat. 1957, p. 2957, § 921.03, which contains the provision that "no judgment of guilty shall be rendered on a verdict unless the jurors clearly express in it a finding against the defendant upon the issue." See also *French* v. *State*, 96 Fla. 657, 118 So. 815.

Moreover, the record contains facts which would have instantly suggested to counsel that petitioner might have a good insanity defense. "[W]hen there is testimony of

*Five years is the maximum sentence for aggravated assault under § 784.04, whereas a 20-year sentence may be imposed for assault with intent to commit felony under § 784.06.

insanity sufficient to present a reasonable doubt of sanity the presumption [of sanity] vanishes. The defendant is then entitled to an acquittal if the state does not overcome the reasonable doubt." *Farrell* v. *State* (Fla. 1958), 101 So. 2d 130, 133. It is too much to expect this mentally ill petitioner effectively to raise and establish the defense of his own insanity, and, so far as this record shows, neither the prosecutor nor the trial court took any notice of the matter.

The question treated in the separate concurring opinion only lurks in the record, as it was not raised, briefed or argued here, and therefore we do not reach or express any views upon it.

For the totality of the reasons reviewed, due process of law required that petitioner have the assistance of counsel at the trial of this case, if the facts and circumstances alleged in his habeas corpus petition are true. On the present record it is not possible to determine their truth. But the allegations themselves made it incumbent on the Florida court to grant petitioner a hearing and to determine what the true facts are.

*Reversed.*

# SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1960.

Elijah McNeal, Jr., Petitioner, v. R. O. Culver, as State Prison Custodian. } On Writ of Certiorari to the Supreme Court of the State of Florida.

[January 23, 1961.]

Mr. Justice Douglas, whom Mr. Justice Brennan joins, concurring.

While I join the opinion of the Court, I rest also on another ground for reversal.

Nearly 19 years ago the Court held in *Betts* v. *Brady*, 316 U. S. 455, that a state court in a criminal case need not appoint counsel to represent an indigent defendant, unless the failure to furnish counsel results in a conviction lacking in "fundamental fairness." *Id.*, 473. That decision was by a divided Court; and six Justices now sit on the Court who had no hand in fashioning the rule.

I cannot believe that a majority of the present Court would agree to *Betts* v. *Brady* were it here *de novo*, especially in light of our unanimous decision in *Chandler* v. *Fretag*, 348 U. S. 3, 9, where we held that the right of a defendant in a state criminal trial "to be heard through his own counsel" is "unqualified." In that case an accused requested a continuance so that he could obtain a lawyer. We held it was reversible error for a state court to deny the request and to put the defendant to trial without counsel. We said that right to counsel turned, not on the nature of the crime charged, but on the importance of the presence of counsel to an accused's right to a hearing. We relied on *Powell* v. *Alabama*, 287 U. S. 45, 68–69:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be

> heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." [1]

The result of our decisions is to refuse a State the power to force a person into a criminal trial without a lawyer if he wants one and can afford to hire one, but to deny the same protection to an accused who is too poor to retain counsel. This draws a line between rich and poor that is repugnant to due process. The need of counsel is the same, whatever the economic status of the accused. If due process requires that a rich man who wants a lawyer be allowed the opportunity to obtain one before he is tried, why should not due process give the same protection to the accused who is indigent? Even penniless vagrants [2] are at times caught in a tangle of laws that only an astute lawyer can resolve, as our own decisions show. *Edwards* v. *California*, 314 U. S. 160; *Edelman* v. *California*, 344 U. S. 357; *Thompson* v. *Louisville*, 362 U. S. 199.

*Betts* v. *Brady* requires the indigent, when convicted in a trial where he has no counsel, to show that there was fundamental unfairness. We have set aside a number of convictions so obtained, as our recent decision in *Cash* v. *Culver*, 358 U. S. 633, 636, n. 6, shows. Yet this is a heavy

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[1] For a scholarly account of an attempt in a contemporary society to abolish procedural safeguards and provide "simple" judicial systems see Hazard, Settling Disputes in Soviet Society (1960).

[2] The manner of administration of vagrancy laws and their harshness, due in part to the denial to the drifters in our midst of the procedural protections which others obtain, is vividly shown in Foote, Vagrancy Type Law and Its Administration. 104 U. of Pa. L. Rev. 603.

burden to carry, especially for an accused who has no lawyer and who cannot afford to hire one. It is a burden placed on an accused solely by reason of his poverty. Its only sanction is *Betts* v. *Brady* which is so at war with our concept of equal justice under law that it should be overruled.[3] Are we to wait to overrule it until a case arises where the indigent is unable to make a convincing demonstration that the absence of counsel prejudiced him?

[3] In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, Mr. Justice Brandeis, writing for the Court, overruled *Swift* v. *Tyson*, 16 Pet. 1. Mr. Justice Butler, speaking for himself and Mr. Justice McReynolds, strenuously objected, pointing out that the question had never been raised or argued, 304 U. S., at 82, 87, and asking that, before *Swift* v. *Tyson* was overruled, the case be put down for reargument. "It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it." 304 U. S., at 88. But the problems created under the regime of *Swift* v. *Tyson* were as abundantly clear to the Court from its screening of hundreds of cases as are those which *Betts* v. *Brady* has spawned.

## APPENDIX.

In 1942, MR. JUSTICE BLACK appended to his dissenting opinion in *Betts* v. *Brady*, 316 U. S. 455, 477, a compilation of the laws of the States regarding the right to appointment of counsel. This Appendix brings the classification down to date. Thirty-three States provide for appointment of counsel as of course on behalf of an indigent in any felony case; 17 States either make no explicit provision for appointment of counsel or make provision therefor only in capital cases or leave appointment of counsel to the discretion of the trial judge.

A. *Appointment of counsel for indigents in all felony cases, as of course, by force of the State Constitution, statutes, court rule, or judicial decision.*

Alaska: Rules of Criminal Procedure, Rule 39 (b).
Arizona: Rules of Criminal Procedure, Rule 163.
Arkansas: Ark. Stat. § 41-1203.
California: Calif. Penal Code § 987.
Connecticut: Gen. Stat. of Conn. (1958 Rev.) § 54-80. See *State* v. *Reid*, 146 Conn. 227.
Georgia: Ga. Const., Art. I, § 5 (Ga. Code Ann. § 2-105). See *Bibb County* v. *Hancock*, 211 Ga. 429.
Idaho: Idaho Code Ann. §§ 19-1512, 19-1513.
Illinois: Ill. Supreme Court Rules, Rule 26 (2), Ill. Rev. Stat. (1959), § 110.26 (2).
Indiana: Ind. Const., Art. I, § 13. See *State ex rel. Grecco* v. *Allen Circuit Court*, 238 Ind. 571.
Iowa: Iowa Code Ann. § 775.4.
Kansas: Gen. Stat. of Kansas (1959 Supp.) § 62-1304.
Kentucky: Ky. Const., Art. I, § 11. See *Calhoun* v. *Commonwealth*, 301 Ky. 789.
Louisiana: La. Rev. Stat. § 15-143.
Minnesota: Minn. Stat., 1957, § 611.07, as amended by Minn. Laws 1959, c. 383.
Missouri: Mo. Rev. Stat., 1949, § 545.820.

Montana: Rev. Code of Montana § 94–6512.
Nebraska: Rev. Stat. of Nebraska (1943) § 29–1803, as amended by Laws 1957, c. 104, § 1, c. 107, § 6.
Nevada: Nev. Rev. Stat. § 174.120.
New Jersey: N. J. Const., Art. I, ¶10; Rev. Rules, § 1:12–9.
New York: N. Y. Code of Criminal Procedure § 308.
North Dakota: N. D. Century Code § 29–01–27.
Ohio: Ohio Rev. Code § 2941.50.
Oklahoma: 22 Okla. Stat. § 464.
Oregon: Ore. Rev. Stat. § 135.320.
South Dakota: S. D. Code § 34.3506; S. D. Code (1960 Supp.) § 34.1901.
Tennessee: Tenn. Code §§ 40–2002, 40–2003.
Texas: Vernon's Texas Code of Criminal Procedure § 494, as amended by Acts 1959, 56th Leg., p. 1061, c. 484, § 1.
Utah: Utah Code Ann. § 77–22–12.
Virginia: Code of Va. § 19.1–241.
Washington: Rev. Code of Wash. § 10.01.110.
West Virginia: Rules of Practice for Trial Courts, Rule IV.
Wisconsin: *Carpenter* v. *Dane County*, 9 Wis. 274. See Wis. Stat. Ann. § 957.26.
Wyoming: Wyo. Stat. § 7–7.

B. *States not making provision for appointment of counsel for indigents in all felony cases.*

Alabama: Code of Ala., Tit. 15, § 318 (capital cases). See *Gilchrist* v. *State*, 234 Ala. 73.
Colorado: Colo. Rev. Stat. § 39–7–29. See *Kelley* v. *People*, 120 Colo. 1.
Delaware: Superior Court Rules, Rule 44 (capital cases and "any other in which the court deems it appropriate").
Florida: Fla. Stat. § 909.21 (capital cases). See *Watson* v. *State*, 142 Fla. 218.

Hawaii: Rev. Laws of Hawaii (1955) § 253-5, as amended by Laws 1957, c. 239 (in force after statehood, see Const., Art. XVI, § 2).

Maine: Me. Rev. Stat., c. 148, § 11 (capital cases and where sentence of life imprisonment may be imposed, otherwise permissive).

Maryland: Md. Rules of Procedure, Criminal Causes, Rule 723 (b) (in all capital cases and other "serious cases").

Massachusetts: Ann. Laws of Mass., c. 277, § 47 ("capital crime").

Michigan: Mich. C. Laws, 1948, § 775.16, as amended by Public Acts 1957, No. 256. See *People* v. *Williams*, 225 Mich. 133.

Mississippi: Miss. Code Ann. (rec. 1956) § 2505 ("capital crime").

New Hampshire: N. H. Rev. Stat. §§ 604:1, 604:2 (capital crimes or other cases where "injustice may be done if provision is not made therefor").

New Mexico: No provisions found.

North Carolina: N. C. Gen. Stat. § 15-4.1. See *State* v. *Davis*, 248 N. C. 318.

Pennsylvania: Purdon's Pa. Stat., Tit. 19, §§ 783, 784 (capital cases).

Rhode Island: Gen. Laws of Rhode Island § 12-15-3. See *State* v. *Hudson*, 55 R. I. 141; *Lee* v. *Kindelman*, 80 R. I. 212.

South Carolina: S. C. Code of Laws § 17-507 (capital cases). See *State* v. *Hollman*, 232 S. C. 489.

Vermont: 13 Vt. Stat. Ann. § 6503. See *State* v. *Gomez*, 89 Vt. 490.